136-114

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 294.

THE NORFOLK AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

FILED FEBRUARY 19, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 20, 1889.

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1 In the Supreme Court of the United States. — Term, 1887.

NORFOLK & WESTERN RAILROAD COMPANY
vs.
COMMONWEALTH OF PENNSYLVANIA. } No. —.

Surwrit of error by Norfolk & Western Railroad Company to the supreme court of Pennsylvania.

Assignments of Error.

1. The learned court erred in sustaining the court of common pleas of Dauphin county in refusing the following point submitted by the Norfolk & Western Railroad Company:

Point: "Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section two of article IV of the Constitution of the United States, which provides that the 'citizens of each State shall be entitled to all the privileges of citizens of the several States.'"

2. The learned court erred in sustaining the court of common pleas of Dauphin county in refusing the following point submitted by the Norfolk & Western Railroad Company:

Point: "The sixteenth section of the act of June 7, 1879, is an abridgment of the privileges and immunities of the citizens of the United States; it discriminates between corporations of the State of Pennsylvania and corporations of other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents, and employees, who were in the State maintaining an office and doing business at and before the passage of the said act, the
2 equal protection of the laws, and is for these reasons void, because in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress—Revised Statutes, section 1977."

3. The learned court erred in sustaining the court of common pleas of Dauphin county in refusing the following point submitted by the Norfolk & Western Railroad Company:

Point: "Inasmuch as the Norfolk & Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania, or from other States to other States, passing through the State of Pennsylvania; and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania; therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot

lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do, and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section eight of article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

4. The learned court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania and against the Norfolk & Western Railroad Company.

5. The learned court erred in not reversing the judgment of the court of common pleas of Dauphin county.

To the honorable the judges of the Supreme Court of United States of America:

Your petitioner prays for a reversal of the judgment entered against it in the supreme court of Pennsylvania for the reasons assigned above.

NORFOLK & WESTERN R. R. CO.,
By its attorney, M. E. HUSTED.

Harrisburg, Pa., Febr'y 19, 1887.

3 [Endorsed:] No. —. — term, 1887. Norfolk & Western Railroad Company *vs.* Commonwealth of Pennsylvania. Assignment of error.

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Norfolk & Western Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or of a statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially claimed or set up under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in

error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy
5 justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventeenth day of January, in the year of our Lord one thousand eight hundred and eighty-seven.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOSEPH P. BRADLEY,
Asso. Justice of Sup. C't U. S.

6 [Endorsed:] Filed in S. C. Feb. 1, '87.

7 The United States of America to the Commonwealth of Pennsylvania, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the middle district, wherein The Norfolk & Western Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this seventeenth day of December, in the year of our Lord one thousand eight hundred and eighty-seven.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

JAN. 17, 1887.

Service of the above citation accepted.
ROB'T SNODGRASS,
Dep. Att'y Gen'l,
For LEWIS C. CASSIDY,
Att'y Gen'l.

8 [Endorsed:] Norfolk & Western Railroad Company *vs.* Commonwealth of Pennsylvania. Citation. Filed in S. C. Feb. 1, '87.

9 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, as follows, to wit:

Copy of Appearance, Docket Entry.

Among the records and proceedings enrolled in the court of common pleas in and for the county of Dauphin, in the Commonwealth of Pennsylvania, to No. 104, November term, A. D. 1883, is contained the following:

In Common Pleas of Dauphin County. No. 104. Nov. Term, 1883.

COMMONWEALTH OF PENNA.
vs.
NORFOLK & WESTERN R. R. Co. } 104.

Cassidy; Olmsted.

SEPT. 27, 1883.

Appeal from the settlement of the auditor general and State treasurer.

Sept. 27, 1883.—Appeal and specifications of objections and bond filed.

Dec. 12, 1884.—*Narr.* and copy of account filed.

Feb'y 1, 1886.—Defendant's points and stenographer's notes filed.

Feb'y 1, 1886.—Deposition of Wm. C. MacDowell filed.

Feb'y 1, 1886.—Opinion and finding of court filed, deciding that there is due the Commonwealth by the defendant $8,347.97 and costs. Counsel notified.

March 2, 1886.—Exception filed on the part of defendant.

April 19, 1886.—Opinion filed, sustaining defendant's sixth exception and overruling the others, and judgment entered for $7,503.12, in accordance with direction of the court.

May 22, 1886.—Writ of error from Supreme Court received and filed.

Certified.

[Seal of the Common Pleas of Dauphin County.]

WM. H. ULRICH,
Prothonotary.

10 *Copy of Account.*

Norfolk and Western Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For office license, per section 16, act of 7th June, 1879, as per application herewith filed, from July 1, 1883, to July 1, 1884 ....

Total authorized capital stock, $25,000,000.

License fee at rate of one-fourth mill on each dollar of authorized capital..... $6,250 00
Due Commonwealth..... $6,250 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *July* 14, 1883.

Settled and entered.

ROB'T S. FRAZER,
For JNO. A. LEMON,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *July* 16, 1883.

Approved.

H. C. GREENEWALT,
For S. M. BAILY,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *July* 16, 1883.

I hereby certify that the above is a true copy of the original remaining on file in this department.

Witness my hand and the seal of office the day and year aforesaid.

[L. S.]

THOMAS McCAMANT,
For JNO. A. LEMON,
Auditor General.

11 *Copy of Appeal.*

In the matter of the account settled by the auditor general July 14, 1883, and approved by the State treasurer July 16, 1883, for $6,250, claimed to be due from the Norfolk and Western Railroad Company for the office license from July 1, 1883, to July 1, 1884.

The said Norfolk and Western Railroad Company hereby appeals from said settlement to the court of common pleas of Dauphin county, and, together with a copy of the account, files the following specifications of objections thereto, agreeably to the provisions of the act of Assembly in such case made and provided.

The said account is erroneous and illegal, and the said company is not bound to pay the same nor any part thereof, because—

1. The sixteenth section of the act of June 7, 1879, upon which said section the account appealed from purports to be based, is void and of no effect, because in conflict with section three of article three of the constitution of the State of Pennsylvania, the subject of the said section, to wit, the prohibition of foreign corporations from having officers in the State without being licensed not being clearly expressed in the title of the act.

2. If the fee required by the sixteenth section of the act of 1879 to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section one of article nine of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects," and is therefore void.

3. The sixteenth section of the act of June 7, 1879, is void, because in conflict with clause four of section eight of article one of
12 the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States."

4. The sixteenth section of the act of June 7, 1879, is void, because in conflict with clause one of section two of article four of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all the privileges of citizens of the several States."

5. The sixteenth section of the act of June 7, 1879, is an abrigment of the privileges and immunities of citizens of the United States. It discriminates between corporations of the State of Pennsylvania and corporations created by other States; it discriminates between corporations and natural persons having offices in this Commonwealth; it discriminates between foreign corporations; and it denies to foreign corporations and to natural persons connected with such corporations the equal protection of the laws, and is for these reasons void, because in conflict with the fourteenth article of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised Statutes, section 1977.

6. As the Norfolk and Western Railroad Company does invest and use and employ capital within the Commonwealth of Pennsylvania, it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and is not by said section required to obtain an office license or pay a license fee.

7. The Norfolk and Western Railroad Company is taxable upon its capital stock under the fourth section of the act of 1879, and is by the terms of the proviso to the sixteenth section of the said act excluded from the operation of the said sixteenth section.

THE NORFOLK AND WESTERN
RAILROAD COMPANY,
By M. E. OLMSTED, *Attorney.*

13 (Endorsement:) Exhibit C. H.C.D. 104. Nov. term, 1883. Commonwealth of Pennsylvania *vs.* Norfolk and Western Railroad Company. Appeal and specifications of objections. Filed Sept. 27, 1883. Filed in the auditor general's department the 27th day of August, 1883. Robert L. Frazer, for John A. Lemon, auditor general. Olmsted, Doran.

(*Copy of Bond on Appeal.*)

Know all men by these presents that we, the Norfolk and Western Railroad Company and Frederick S. Kimball, of the city of Philadelphia and State of Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of twelve thousand five hundred dollars ($12,500.00), lawful money of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorneys or assigns; to which pay-
14 ment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and the corporate seal of said company and dated the 29th day of August, A. D. 1883.

Whereas the above-bounden Norfolk and Western Railroad Company has entered in the office of the auditor general of Pennsylvania an appeal to the court of common pleas of Dauphin county from the settlement of an account for office license, amounting to six thousand two hundred and fifty dollars ($6,250.00), made by the auditor general on the 14th of July, 1883:

Now, the condition of this obligation is such that if the said Norfolk and Western Railroad Company shall prosecute its said appeal with effect and pay all costs or charges which the court or arbitrators having jurisdiction to hear and determine said appeal shall award, and also pay any sum of money which shall appear by the judgment of the court or award of arbitrators to be due upon said account to the Commonwealth of Pennsylvania, then this obligation to be void and of no effect, or otherwise to be and remain in full force and virtue.

NORFOLK AND WESTERN
RAILROAD COMPANY,
By F. J. KIMBALL, *President.*

Attest: A. J. HEMPHILL, *Secretary.*

[Seal of the Norfolk and Western Railroad Company.]

15 F. S. KIMBALL. [SEAL.]

Signed, sealed, and delivered in presence of—
JOHN W. BROCK.

The security of the above bond is approved.
T. K. FINLETTER.

(Endorsement:) No. 104. November term, 1883. Commonwealth of Pennsylvania *vs.* Norfolk and Western Railroad Company. Bond on appeal from the settlement of an account by the auditor general and State treasurer. And now, to wit, September 11, 1885, the security of the within bond is approved. J. W. Simonton, P. J. Filed Sept. 27, 1883. M. E. Olmstead, attorney for defendant.

(*Narr. and Copy of Account.*)

In Dauphin Common Pleas. No. 104. Nov. Term, 1883.

DAUPHIN COUNTY, *ss:*

The Commonwealth of Pennsylvania, by her attorney general, complains of the Norfolk and Western Railroad Company of
16 a plea that they render unto the said Commonwealth the sum of one hundred thousand dollars, lawful money of the United States, which they owe to and unjustly detain from her; for that whereas the said defendants, on the 16th day of September, A. D. 1883, at the county of Dauphin aforesaid, were indebted to the said plaintiff in the sum of six thousand two hundred and fifty dollars, lawful money of the United States, on an account examined, adjusted, settled, and signed by the auditor general of this Commonwealth and duly entered in the books of his office, as authorized and required by law, on the day and year last aforesaid, in which a certain sum of money, to wit, the sum last aforesaid, is due and owing the said plaintiff from the said defendants, with interest thereon, at the rate of twelve per centum per annum, from and after the expiration of two months from the day upon which the said account was so as aforesaid examined, adjusted, settled, and signed by the auditor general of this Commonwealth, which said account was, on the 16th day of July, A. D. 1883, submitted to, revised, and approved by the State treasurer, and a copy thereof, within thirty days thereafter, sent by the auditor general, under his hand and seal of office, to the said defendants, and which yet remains in full force against the said defendants and appealed from, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff to demand and have of and from the said defendants a certain sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account so as afore-
17 said examined, adjusted, settled, and signed by the auditor general of this Commonwealth, parcel of the said sum above demanded; and, being so indebted, the said defendants, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, promised to pay to the said plaintiff on request the said last-mentioned sum of money.

And whereas, also, the said defendants, on the day and year in the first count mentioned, at the county aforesaid, were indebted to the said plaintiff in a certain further sum of money, to wit, the sum mentioned and ascertained to be due to this Commonwealth in the said account in the first count mentioned, for money then and there

had and received by the said defendants to and for the use of the said plaintiff; and also a certain further sum of money, to wit, the sum last aforesaid, on an account settled and entered by the auditor general of this Commonwealth against the said defendants on the day and year in the first count mentioned, and approved by the State treasurer on the day and year in the first count mentioned.

And whereas, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants, in consideration of the premises, promised to pay the two last-mentioned several sums of money respectively to the said plaintiff on request; yet the said defendants have disregarded their said promise, and, although often requested so to do, have not as yet paid any of the said several sums of money or any part thereof, to the damage
18 of the said plaintiff of one hundred thousand dollars; and therefore he [it] brings suit, &c.

ROBERT SNODGRASS,
Deputy Attorney General,
For LEWIS C. CASSIDY,
Attorney General.

(*Copy of Account.*)

Norfolk and Western Railroad Company in account with the Commonwealth of Pennsylvania, Dr.

For office license, per sec. 16, act 7th June, 1879, as per application herewith filed, from July 1st, 1883, to July 1st, 1884	
Total authorized capital stock, $25,000,000.	
License fee at rate of one-fourth mill on each dollar of authorized capital	$6,250 00
Due Commonwealth	$6,250 00

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *July 14th*, 1883.

Settled and entered.

ROBERT S. FRAZER,
For JOHN A. LEMON,
Auditor General.

TREASURY DEPARTMENT OF PA.,
HARRISBURG, *July 16th*, 1883.

Approved.

H. C. GREENAWALT,
For S. M. BAILY,
State Treasurer.

AUDITOR GENERAL'S DEPARTMENT,
HARRISBURG, *Nov. 21st*, 1884.

I hereby certify that the above is a true copy of the original remaining on file in this department.

2—294

19 Witness my hand and seal of office the day and year aforesaid.

[Seal of Auditor General of Pennsylvania.]

THOMAS M'CAMANT,
For J. B. NILES,
Auditor General.

(Endorsement:) Office license. Account of the Norfolk and Western Railroad Co. Settled July 16th, 1883.

(Endorsement:) Exhibit A, H. C. D. No. 104. Nov. term, 1883. Commonwealth of Pennsylvania *vs.* Norfolk and Western Railroad Company. *Narr.* and copy of account. Filed Dec. 12th, 1884.

(*Defendant's Points.*)

In the Court of Common Pleas of Dauphin County. November Term, 1883.

COMMONWEALTH OF PENNA.
vs.
NORFOLK AND WESTERN RAILROAD COMPANY. } No. 104.

First. As the Norfolk and Western Railroad Company did, during the period covered by this suit, invest and use in the State of Pennsylvania a large sum of money, to wit, over eight hundred thousand dollars ($800,000), it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and was not by said section required to obtain an office license or pay a license fee.

Second. If the fee required by the sixteenth section of the act of June 7, 1879, to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section 1 of article IX of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects," and is therefore void.

20 Third. Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section 2 of article IV of the Constitution of the United States, which provides that the "citizens of each State shall be entitled to all the privileges of citizens of the several States."

Fourth. The sixteenth section of the act of June 7, 1879, is an abridgement of the privileges and immunities of citizens of the United States. It discriminates between corporations of the State of Pennsylvania and corporations created by other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natual persons connected with such corporations, particularly this defendant and its officers,

agents, and employees, who were in this State maintaining an office and doing business at and before the passage of the said act, the equal protection of the laws, and is for these reasons void, because in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised Statutes, section 1977.

Fifth. Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania, or from other States to other States passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section 8 of article I of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States."

These points are submitted for the decision of the court, in accordance with the provisions of the act of April 22, 1874.

NORFOLK AND WESTERN RAILROAD COMPANY,

(Signed) By its attorney, M. E. OLMSTED.

21 (Endorsement:) No. 104. Nov. term, 1883. Exhibit E, H. C. D. Commonwealth of Pennsylvania *vs.* Norfolk and Western Railroad Company. Defendant's points. Filed February 1st, 1886. Olmsted.

(*Deposition of Wm. C. Macdowell and Exhibits.*)

In the Common Pleas of Dauphin County.

COMMONWEALTH OF PENNSYLVANIA *vs.* NORFOLK AND WESTERN RAILROAD COMPANY. } November Term, 188–.

STATE OF PENNSYLVANIA, *City of Philadelphia,* } *ss:*

On the fourth day of January, 1886, before me, the subscriber, a notary public in and for the said State and city, personally appeared William G. Macdowell, who, being by me duly sworn according to law, did depose and say—

I. That he is the comptroller of the Norfolk and Western Railroad Company and was treasurer of the said company from the date of its organization, in May, 1881, to June 1st, 1883, from which time he has been the comptroller of the said company, and as such

is familiar with the character and extent of the business of the company and its contracts relating to the transportation of freight and passengers; that he is a resident in the city of Philadelphia, and his offices as treasurer and comptroller of the said company have been in the city of Philadelphia; that he has had an experience in railroad operations extending over the last seventeen years, principally in the service of the Empire Transportation Company, having served in various capacities in the department of railroad accounting from a subordinate clerical position to that of an officer having entire charge thereof.

22 II. That the Norfolk and Western Railroad Company is and was before the first day of July, 1883, a railroad corporation existing under the laws of the States of Virginia and West Virginia, and then and since has owned and operated lines of railroad in these States; that the main office of the Norfolk and Western Railroad Company is at the city of Roanoke, Virginia; that the main line of the Norfolk and Western Railroad Company, not including its branches, extends from the seaboard at Norfolk, Virginia, to Bristol, Tennessee, a distance of about four hundred and eight miles, and the New River Division of said road extends from Central, in Montgomery county, Virginia, northward through counties in the States of Virginia and West Virginia, to Pocahontas, near the boundary line between the said States, a distance of about seventy-five miles, and the main line and all the branches of the Norfolk and Western railroad are wholly in the States of Virginia and West Virginia; that the main line of said railroad from Norfolk to Bristol was formerly owned and operated by the Atlantic, Mississippi and Ohio Railroad Company, which becoming insolvent its property and franchises were sold in the year 1881 at judicial sale, and were purchased by or on behalf of persons interested in the present corporation, many of whom are residents of the State of Pennsylvania; that after the reorganization of the Atlantic, Mississippi and Ohio Railroad Company under the name of the Norfolk and Western Railroad Company several railroad companies of Virginia and West Virginia, under whose franchises the New River Division has been built, were, before July 1st, 1883, consolidated and merged into the Norfolk and Western Railroad Company; that the said New River Division extends partly through the State of West Virginia for a distance of about forty miles, connecting the main line with the coal mines of the Flat Top coal region; that the Norfolk and Western railroad at Bristol connects with the line of the East Tennes-

23 see, Virginia and Georgia Railroad Company, which owns and controls railroads aggregating about fifteen hundred miles in length, extending into the Southern cotton fields and reaching, either directly or by immediate connections, Memphis, New Orleans, and other immediate trade centers, and at Roanoke, about one hundred and fifty miles east of Bristol, with the line of the Shenandoah Valley Railroad Company, which extends northward and connects at Hagerstown, Maryland, with the system of railroads of the Pennsylvania Railroad Company.

That the East Tennessee, Virginia and Georgia Railroad Company,

the Norfolk and Western Railroad Company, and the Shenandoah Valley Railroad Company, by contract dated the twenty-seventh day of September, 1881, a copy of which is annexed hereto, marked "A," and made part hereof, entered into an arrangement, still in force, for the conduct of through business, under the name of the Virginia, Tennessee and Georgia Air Line. A map showing the line of the Virginia, Tennessee and Georgia Air Line is hereto annexed, marked "B," and made part hereof, and this map deponent believes to be substantially correct; that the Norfolk and Western Railroad Company, by contract dated the eleventh day of December, 1883, also entered into an arrangement, still in force, with the East Tennessee, Virginia and Georgia Railroad Company, the Shenandoah Valley Railroad Company, the Western Maryland Railroad Company, the Cumberland Valley Railroad Company, and the Pennsylvania Railroad Company for the establishment of a through fast freight transportation line, known as the "Great Southern Despatch," copy of which contract is hereto annexed, marked "C," and made part hereof.

That at Lynchburg, about two hundred and four miles east of Bristol, the Norfolk and Western railroad connects and interchanges passenger and freight traffic with the Virginia Midland railroad, which extends northward to the city of Alexandria, connecting at that point with the roads of the Pennsylvania railroad system, and also connects with the Richmond and Allegheny railroad, extending to Richmond, Virginia.

24

That at Burkeville, about two hundred and seventy-five miles east of Bristol, the Norfolk and Western railroad contracts [connects] with the Richmond and Danville railroad system, which, via Richmond and Quantico, Virginia, connects with the system of the Pennsylvania Railroad Company.

That at Petersburg, about three hundred and twenty-seven miles east of Bristol, the Norfolk and Western Railroad connects with the Richmond and Petersburg railroad of the Atlantic Coast Line system of railroads, which, via Richmond and Quantico, also connects with the roads of the Pennsylvania railroad system.

That at Norfolk, its seaboard terminus, the Norfolk and Western railroad connects with the New York, Philadelphia and Norfolk railroad, which, via Cape Charles Station, Virginia, and Delmar, Delaware, connects with roads owned and controlled by and connecting with the Pennsylvania railroad system of roads; that at Norfolk the Norfolk and Western railroad also connects with the Baltimore Steam Packet Company and the Clyde Line of steamers, connecting directly and indirectly with the city of Philadelphia, and also at Norfolk with the Old Dominion Steamship Company, running to the city of New York, and with the Merchants' and Miners' Transportation Company, running two lines of steamships from Norfolk, one to Boston, and one to Providence, all of which steamer lines connecting at Norfolk are links of the Virginia, Tennessee and Georgia Air Line for the transportation of through freights by rail and water in both directions between the Middle and New England States and the Southern and Southwestern States, the Norfolk and

Western railroad being an intermediate and connecting link between the steamship lines on the north and East Tennessee, Virginia and Georgia, the Louisville and Nashville, and other great railroad systems on the south.

That all of these connecting lines were in existence at the date of the organization of the Norfolk and Western Railroad Company, in May, 1881, with the exception of the connection with the Shenandoah Valley railroad at Roanoke and the Richmond and Alleghany railroad at Lynchburg, which were not completed until the year 1882, and with the New York, Philadelphia and Norfolk railroad at Norfolk, which was not completed till the year 1884; that from the date of its organization, or, in the exceptional cases just cited, from the date of completion of the then excepted connection, the Norfolk and Western railroad has had large business transactions with all of these connecting lines in the way of interchange of freight and passengers, and the table hereto annexed, marked "E," made up from the books of the Norfolk and Western Railroad Company, and made part hereof, shows the extent of its business relations with its connecting lines for the years 1883 and 1884.

III. That, resulting from the junctions with the transportation lines herein described and the contracts herein referred to, close connections with trains and with steamships have been established for the purpose of creating and maintaining through transportation routes for passengers and freight, whereby passengers may be ticketed at points and in States distant from the termini of the Norfolk and Western Railroad Company and be transported on through tickets over its line to other points in other States likewise distant from its termini, and that similarly through freight receipts may be given and the freight properly and promptly transported between distant points traversing en route the whole or part of the Norfolk and Western railroad.

That the through lines or routes of travel and transportation thus established are well known to the public, and their popularity is maintained by an efficient through service of cars and trains and by widespread advertisements, and that to further maintain their popularity specific and attractive names have been adopted, such as "Kennesaw route," "Shenandoah route," "Virginia, Tennessee and Georgia Air Line," "Great Southern Despatch," &c., by all of which means it is intended to keep them before the public, particularly as routes for through transportation; that the "Kennesaw route" is a long-established and favorably known route for passengers between the Middle and New England States and the Southern and Southwestern States via the cities of Philadelphia, Baltimore, and Washington, thence via the Baltimore and Ohio, Shenandoah Valley, and Norfolk and Western railroads to Bristol, and thence via the East Tennessee, Virginia and Georgia railroad, the Louisville and Nashville railroad, and their connections to Nashville, Memphis, New Orleans, and other distant points.

That the "Shenandoah route" is a similar route via the cities of Philadelphia, Harrisburg and Hagerstown and thence via the Shenandoah Valley and Norfolk and Western railroads to all points

reached by the East Tennessee, Virginia and Georgia railroad and its various connections.

That certain arrangements have been made and are in force for running many through passenger, baggage, and express cars, including particularly through Pullman sleeping cars, in connection with through passenger routes, which cars, for the convenience of the traveling public, traverse two or more of the lines of railway composing the through passenger route.

That the "Virginia, Tennessee and Georgia Air Line" is a through "rail-and-water" route for freight transportation by water from Boston, Providence, New York, and other northeastern points to Norfolk, thence via the Norfolk and Western railroad, the East Tennessee, Virginia and Georgia railroad, and its various connections to points south and southwest.

27 That the "Great Southern Despatch" is similarly an "all-rail" freight route from New York, Philadelphia, Baltimore, and other seaboard and interior cities via the Shenandoah Valley railroad and its northern connections and the Norfolk and Western railroad and the East Tennessee, Virginia and Georgia railroad, with its various southern connections, to southern and southwestern points.

That in order to accommodate the through freight offered for transportation new cars have been built and complete arrangements have been perfected whereby the cars of one railroad company forming a link of the through route are forwarded over two or more lines of railroad through several States to destination so as to facilitate through freight transportation by avoiding transfers from car to car en route.

That large sums of money have been expended by the Norfolk and Western Railroad Company in perfecting and maintaining the said through lines, and that similarly the other railroad companies co-operating in the formation of the various through lines have expended various sums of money and provided various facilities, all in the joint interest of the companies participating in the through transportation.

That the Shenandoah Valley Railroad Company, with which the Norfolk and Western Railroad Company has by contracts relating to the interchange of business and otherwise close business relations, has, under its contracts with the Pennsylvania and other railroad companies, close and valuable connections with and privileges to enjoy the facilities of railroads entering the cities of Washington, Baltimore, Philadelphia, and New York.

That, in pursuance of the establishment of close relations with the Shenandoah Valley Railroad Company and other connecting lines, the said company and the Norfolk and Western Railroad Company have entered into a contract with the Washington, Ohio and

28 Western Railroad Company looking to the completion of the latter company's line of railroad to a junction with the Shenandoah Valley railroad in order to further establish and maintain arrangements for the conduct of through freight and passenger transportation; that the said contract was the subject of negotiations

pending during the years 1883 and 1884, and during these negotiations the Washington, Ohio and Western Railroad Company had an office in the city of New York. A copy of this contract is hereto annexed, marked "D," and is made part hereof.

IV. That large quantities of freight and large numbers of passengers were, during the period covered by this suit, and still continue to be, transported over the through routes described between points in several States distant from the line of the Norfolk and Western railroad in both directions, and also between such distant points and local points on the line of the Norfolk and Western railroad; that the tonnage of the Norfolk and Western Railroad Company has from the time of organization consisted largely of cotton brought from the Southwestern States via Bristol to different points in the Eastern States, and that there also is a large tonnage of coal shipped over its line from the Flat Top coal region, in West Virginia and Virginia, to Norfolk, and shipped thence to the New England States and other points in the United States and elsewhere; that there is along the line of the Norfolk and Western railroad a large production of iron ore and of pig iron, and also of lumber, tobacco, and cattle, shipped chiefly to Pennsylvania and New York. Statement hereto annexed marked "F" and made part hereof is taken from the books of the Norfolk and Western Railroad Company and correctly shows, as deponent believes, the "through" cotton shipments of the Norfolk and Western Railroad Company during the cotton seasons of 1882–'3, 1883–'4, and 1884–'5. Statement hereto an-
29 nexed marked "G" and made part hereof is taken from the books of the Norfolk and Western Railroad Company and correctly shows, as deponent believes, the "through" coal shipments for 1883, 1884, and 1885.

V. That, as a result of the general growth of the country and the close business and commercial relations between the different parts of the United States and the extent and character which the transportation business has assumed and to meet the demands of the public, it is and has been for many years absolutely necessary for railroad companies, regardless of State limits and the termini of railroads of particular companies, to establish and maintain through routes for the transportation of freight and passengers, and in order to properly maintain their relations with connecting lines and conduct their general commercial and financial operations it has become necessary to establish main or branch offices at or near the railroad and financial center of their respective sections of the country.

That at and since the date of the organization of the Norfolk and Western Railroad Company the main offices of the Pennsylvania Railroad Company and the Clyde Line of steamers were and still are in the city of Philadelphia; the Shenandoah Valley Railroad Company also had and still have an office there; the Old Dominion Steamship Company, the East Tennessee, Virginia and Georgia Railroad Company, and the Richmond and Allegheny Railroad Company had and still have offices in the city of New York, and the offices of the Baltimore Steam Packet Company and Merchants'

and Miners' Transportation Company have for many years been in the city of Baltimore.

That the Pullman's Palace Car Company's principal office for the superintendence of the division in whose jurisdiction the Pullman car lines embracing those via the Norfolk and Western railroad is placed has for many years been and is now in the city of Philadelphia.

That lately the New York, Philadelphia and Norfolk
30 Railroad Company had established an office in Philadelphia; that the Lynchburg Iron Company has had an office there for some years, and the principal owner of the Crozer Steel and Iron Company is a resident in the neighborhood of Philadelphia, the Lynchburg Iron Company and the Crozer Steel and Iron Company having been, since the year 1883, the principal producers of iron on the line of the Norfolk and Western Railroad Company; that the Southwest Virginia Improvement Company, which up to about January 1st, 1885, was the sole miner of coal on the line of the Norfolk and Western Railroad Company, has since its incorporation had its office in Philadelphia.

That at the time of the organization of the Norfolk and Western Railroad Company, in May, 1881, it was made a provision in its general mortgage bonds that the coupons should be payable in the city of Philadelphia or New York, and since that time all its other mortgage coupons have been made payable in the city of Philadelphia or New York; that the interest payments of the company on such coupons for the years 1883 and 1884 aggregated about $750,000.

VI. That at the time of the organization of the Norfolk and Western Railroad Company, in the year 1881, in view of its business relations with connecting lines of railroad, the proper management of its freight and passenger business, and the general, commercial, and financial transactions of the company, it became necessary to establish an office for the company either in the city of New York or Philadelphia in addition to its main office, in Virginia; that for an extensive and important part of the United States the cities of New York and Philadelphia are financial and railroad centers, and an office has been established in one or the other of said cities by nearly every leading railroad company in the country; that by reason of the large interests owned or represented in the Norfolk and Western Railroad Company by persons resident
31 in the city of Philadelphia and its vicinity, and as well from the fact that the offices of the Shenandoah Valley Railroad Company, the Pennsylvania Railroad Company, and other connecting and related transportation lines were in the city of Philadelphia or its vicinity, and that Philadelphia was as good a market for the purchase of railroad supplies as New York, it was determined to locate an office of the Norfolk and Western Railroad Company in the city of Philadelphia.

That during the years 1882, 1883, and 1884 the purchases of materials and supplies made by the Norfolk and Western railroad for itself and companies controlled by it were approximately as follows: 1882, $827,375.82; 1883, $870,685.61; 1884, $991,768.66. These fig-

ures have been furnished to deponent by the purchasing agent of the said companies, and from this fact and from my general knowledge of the subject I believe them to be approximately correct.

That since the establishment of the office of the Norfolk and Western Railroad Company in the city of Philadelphia it has been found that the said office has fully subserved the requirements that led to its establishment, and that the purpose could not have been better accomplished if the said office had been located in the city of New York, and the Norfolk and Western Railroad Company could not at any time in the year 1883 or since have dispensed with its office in Philadelphia or removed the office to New York city without seriously disturbing its own business conveniences and those of connecting lines and main shippers over its route, and unless it were to maintain its office in the city of Philadelphia for the purposes aforesaid the company would be deprived of the ordinary and usual commercial conveniences and facilities now enjoyed in Philadelphia and required for the transaction of its business of transporting interstate freight and passengers.

VII. That the Norfolk and Western Railroad Company
32 did, during the period covered by this suit, maintain an office for the reasons and purposes aforesaid in the city of Philadelphia and State of Pennsylvania.

VIII. That with, the exception of office furniture, &c., and such of its rolling stock as may happen to be in this State on connecting lines in the transportation of through freight, the said company owns no property and has none of its capital invested in the State of Pennsylvania.

WILLIAM G. MACDOWELL.

Sworn and subscribed before me the day and year first aforesaid.

WALTER C. RODMAN,

[L. S.] *Notary Public.*

A.

This agreement, made and entered into this twenty-seventh day of September, 1881, between the East Tennessee, Virginia and Georgia Railroad Company, of the first part, the Norfolk and Western Railroad Company, of the second part, and the Shenandoah Valley Railroad Company, of the third part, witnesseth:

Whereas it is deemed essential to the protection and proper development of the properties of the respective companies, parties to this agreement, that a consolidation of the stock and securities of the said companies be effected as soon as practicable:

It is hereby agreed that a committee of three be appointed by the boards of the three companies to prepare and submit a plan of consolidation of the stock and securities with the view of forming one company, which is to own and operate the properties of the three companies, parties to this agreement. Until such plan of consolidation shall have been submitted to and ratified by the three companies, or in the event of a failure on their part to so consolidate and form one company, then this agreement is made and entered

into expressly for the purpose of securing a consolidation of the business affairs of the three companies in such a way that they cannot be separated or operated in competition with each other, but must be conducted for the mutual benefit of the parties to this agreement in the same manner as if the properties were owned and controlled by one company; and in order to secure these results it is hereby agreed that the consolidation of the business affairs of the three companies be made in the manner and upon the conditions following:

33 First. The business in which the three companies or any two of them are jointly interested shall be placed under the charge of a joint committee, consisting of three members, who shall be appointed in the following manner: One by the board of directors of the East Tennessee, Virginia and Georgia Railroad Company and one by the joint action of the board of directors of the Norfolk and Western and Shenandoah Valley Railroad Companies. These two members shall appoint a third person, who shall act as the executive officer of the committee, and who shall be known by the title of the general manager of the Virginia, Tennessee and Georgia Air Line, and the salary of such officer shall be fixed by such committee. For economical and efficient management the office of said general manager shall be located as near as possible in the center of the lines as may be agreed upon by the joint committee.

Second. The joint committee shall be appointed for a term of three years and until their successors shall be appointed, and any vacancies which may occur, by death, resignation, inability, or refusal to act, shall be filled in the same manner in which the original appointment was made, as prescribed in the preceding section of this agreement. In case the company having the right to fill the vacancy shall fail to fill such vacancy within one month after notice of such vacancy being given it may be filled by the surviving or acting members of such committee. In the meantime the surviving or acting members of the committee shall continue to act. Any member of said committee can be removed by the company he represents, and the third member, who is to act as general manager, can be removed by the joint action of the companies, parties hereto, or by the agreement of two members of the committee.

34 Third. So long as the three companies shall remain separate the joint committee shall manage the joint business of the three companies, or any two of them (in the event of consolidation of any two of them), in the same manner as if a consolidation of the stock and securities of all three of them had actually been effected, and in the conduct of the business the joint committee shall always have in view the true intent and object of this agreement, to secure the good of the property as a whole, without regard to any advantage that may accrue to either company separately; to afford mutual protection against the competition of rival transportation lines, so that each party to this agreement may receive all the business of the others to which it is legitimately entitled.

Fourth. It shall be the duty of the joint committee from time to time to prescribe and enforce such rules and regulations for the con-

duct of the business placed under its charge as will best protect and promote the interests of the parties to this agreement.

Fifth. The freight and passenger business of each company shall be under the charge of a freight and passenger agent, who shall be appointed by the respective companies, parties to this agreement. Such freight and passenger agents shall report to the general freight and passenger agent, who shall be appointed by the general manager of the Virginia, Tennessee and Georgia Air Line and be subject to removal by him, and who shall report to and receive instructions from such general manager.

Sixth. The property of each company shall be under the immediate management of such superintendents, either divisional or general, or both, as such companies may see proper to appoint, and who shall be responsible for the proper operations of the roads under their charge; but such general superintendents, or, in
35 cases where no general superintendent has been appointed, the divisional superintendents or the heads of the operating departments, shall report to the general manager of the Virginia, Tennessee and Georgia Air Line, and shall be subject to his orders.

Seventh. Each company shall, upon written request signed by all the members of the joint committee, promptly remove any of its freight and passenger agents, divisional and general superintendents, or heads of operating departments who, in the opinion of such committee, shall have been found inefficient or otherwise objectionable, and such companies shall promptly fill the vacancies so created, giving preference in the appointments to such persons as may be recommended by the joint committee.

Eighth. The auditor's and treasurer's office of each company shall remain separate and under the control of the respective company [companies], although the duties of these officers may be performed by the same persons.

Ninth. The general manager's office shall be supplied with all the assistance and clerical help that the general manager may find necessary to conduct the business in a systematic manner.

Tenth. The expenses of the general management provided for in this agreement shall be borne by the respective companies in proportion to the gross earnings from all sources of each company, but the Shenandoah Valley Railroad Company shall not be called upon to bear any proportion of the expenses of such general management until the time when the said Shenandoah Valley railroad shall have completed its connection with the said Norfolk and Western railroad. It shall be the duty of the general manager to furnish
36 each company with monthly statements showing all the expenses, including the salaries of the general manager, of the general freight and passenger agent, assistants, and clerks, and each company's proportion of the same, and the general manager's drafts for such proportion shall be promptly honored by each company, party to this agreement.

Eleventh. It shall be the duty of the general manager to furnish the joint committee with the proper vouchers covering the disbursements on account of the expenses of the general management.

Twelfth. The organization now in existence for advertising, for soliciting, receiving, billing, and forwarding freights at Eastern and Southwestern cities, and for the settlement of claims and expenses, known as the Virginia and Tennessee Air Line, shall be continued and placed under the management and control of the general manager of the Virginia, Tennessee and Georgia Air Line, who shall have full power and authority to employ such agents, clerks and to establish such offices and to employ such means as he may deem proper for securing tonnage and travel over the Virginia, Tennessee and Georgia Air Line.

Thirteenth. The organization now known as the Virginia and Tennessee Air Line will hereafter be denominated the Virginia, Tennessee and Georgia Air Line.

Fourteenth. It shall be the duty of the general manager to prescribe proper rules and regulations for the conduct of the business of the Virginia, Tennessee and Georgia Air Line. He shall have authority to establish and from time to time regulate the through rates of freight and passengers and the classification of freight between the Eastern cities and points accessible by means of the
37 Virginia, Tennessee and Georgia Air Line and its connections, and to cause special contracts to be made for the transportation of freights and passengers upon such terms as he may deem expedient, and all through bills for freights and through passenger rates and special contracts shall be received, honored, and treated as the acts of the several parties to this agreement as though the same were the act of each separate company.

Fifteenth. The general manager shall have authority to enter into traffic arrangements with connecting railroad and steamship companies, subject to the approval of the joint committee.

Sixteenth. The general manager shall have authority to enter into agreements with competing lines for a division of competitive business or for the maintenance of equal rates and classifications to common points, subject to the approval of the joint committee. Such agreements shall be strictly carried out by the parties to this agreement.

Seventeenth. The expenses of the organization heretofore known as the Virginia and Tennessee Air Line, referred to in the twelfth and thirteenth sections of this agreement, shall be divided between the companies in interest upon the basis of gross revenue derived from the business of Virginia, Tennessee and Georgia Air Line. It shall be the duty of the agent of claims and expenses to render to each company monthly accounts showing in detail the expenses and each company's share thereof, and his drafts for the amount due shall be honored promptly by the companies parties to this agreement. Any controversies as to the amount due by any company or as to the liability of any company for lost or damaged goods which cannot be adjusted satisfactorily by the agent of claims and expenses or by the general manager shall be referred to the joint committee, whose decision shall be final.

38 Eighteenth. The business originating and terminating within the limits of the properties of the companies parties

to this agreement shall be denominated the local business of such companies, and the tariff of rates on such business and the entire revenue derived from it shall be under the exclusive control of the respective companies on whose properties it originates and terminates.

Nineteenth. The business between the local stations of either party to this agreement and the local stations of the other party or parties and the business between the local stations of the one party and the terminal points, points of intersection with competing transportation lines and points beyond the limits of the properties of the other party or parties to this agreement, shall be denominated the connection business, and the tariff of rates on such business and the division of the revenue derived from it shall be established from time to time by agreement between the parties interested. In the event of a failure to agree upon a connection tariff each company in interest shall be entitled to receive its local rates in accordance with the distance it has transported such freight or passengers.

Twentieth. The business between points beyond the limits of the properties of the parties to this agreement and any terminal points of intersection with competing transportation lines or points beyond the limits of these properties, when passing over the entire length or over a portion of the roads of two or three parties to this agreement, shall be denominated the through competitive business, and the tariff of rates and the classification on such business shall from time to time be established by the general manager, and the revenue derived from such business shall be divided between the parties in interest upon the basis of the actual mileage each party has
39 transported such business over its road: Provided, That a proper and equitable allowance shall be made to either company for extraordinary expenses incurred in the conduct of the business of the line at terminal or junction points; such charges and allowances to be regulated by the joint committee.

Twenty-first. Neither party to this agreement shall enter into any combinations, arrangements, or connections of any kind or description with any other transportation company by which any portion of the business which can be transported over the roads of the other parties to this agreement or any portion of such roads can or will be diverted from such roads, except with the written consent of the companies the other parties to this agreement, nor shall any party to this agreement lease, purchase, or construct any railroads or steamships the operation of which may, in the opinion of the joint committee, result in the diversion of any business from the roads of the other parties to this agreement.

And it is further understood and agreed by the parties hereto that the Norfolk and Western railroad and the Shenandoah Valley Railroad Company shall have the right to consolidate and merge themselves into one company and to assume any corporate title they may choose without any abrogation or variation of this contract, and, in case the said two companies shall so merge, any clause in this agreement applying to either or both of the said companies shall be considered as applying to the said new company so formed by merger or consolidation.

Twenty-second. Each party to this agreement shall, upon the requisition of the general manager, furnish such proportion of the equipment as he may deem necessary for the proper conduct of the business. A mileage account shall be kept of the equipment
40 of each company when used by the other companies, and the balance due by one company to the other shall be settled in cash at such rates as may be agreed upon, or in kind, as may appear to the general manager fair and equitable.

It shall be the duty of the general manager to prescribe and enforce proper rules and regulations for the interchange of equipment, of the keeping of mileage accounts, for making repairs of equipment and charges for the same, and for imposing fines for any improper use or detention of cars.

Twenty-third. Any other services which may be performed by either company to the others shall be paid for at such prices as the general manager may deem fair and equitable.

Twenty-fourth. The freight charges upon all tonnage passing between the parties to this agreement shall follow the tonnage and be collected at destination, each company assuming all the charges up to the beginning of its own lines. Each company party to this agreement shall settle and pay in the currency of the United States, within twenty-five days succeeding the close of each month's operations, such balances as it may owe to the other companies for and on account of the transportation of passengers and tonnage and for rents and repairs of cars.

Twenty-fifth. The finances and accounts of the several companies are to be kept separate and the funds belonging to each company shall be applied to the payment of interest, betterments, and for other purposes, all under the direction of such companies.

Twenty-sixth. It shall be the duty of the general manager to cause proper schedules to be made for the running of through
41 passenger and freight trains over the roads of the parties to this agreement, and to arrange, as far as practicable, for the proper connection with other transportation lines.

Twenty-seventh. In addition to the duties of the general manager in connection with the joint business of the parties to this agreement, he shall, when requested by any of the companies parties to this agreement, exercise a general supervision over the operations of their respective roads, including the work of improving the physical condition of the properties, increasing the equipment, extending lines, and purchasing additional railroad properties and developing the local business of the roads.

In all such cases such duties shall be performed under the direction of the respective companies who may desire his services; but the general manager shall not be called upon to exercise such supervision over the construction of the line from Rome to Macon, the line from Knoxville to Kentucky State line, the completion of the Morristown Branch to a connection with the Western North Carolina railroad, and the line from Ooltewah to the Dalton line, it being understood and agreed that only such portions of these lines shall

come under his management as may from time to time be opened for business.

Twenty-eighth. The Norfolk and Western Railroad Company agrees to complete its New River Coal Branch and any extension thereof that they may deem desirable, with the necessary sidings, depots, and other facilities for doing business.

The Shenandoah Valley Railroad Company agrees to complete its road to a junction with the Norfolk and Western railroad, with the necessary sidings, branch roads, depots, and other facilities for doing business.

This company may extend its road to Rocky Mount, Virginia, or to any other point in the mineral region south of the Norfolk and Western railroad.

42 Twenty-ninth. The East Tennessee, Virginia and Georgia Railroad Company agrees to complete the line from Rome to Macon, the line from Knoxville to the Kentucky State line, the Morristown Branch to a connection at Paint Rock with the Western North Carolina railroad and the so-called "cut off" from Ooltawah to the Dalton line, with all the necessary sidings, depots, and other facilities for doing business.

Thirtieth. It is hereby distinctly understood and agreed that neither party to this agreement shall be allowed to construct any new roads, other than those provided for in this agreement, that will in any manner divert or injure the business of the others, without the consent of all the parties to this agreement, nor shall either party acquire any new roads or extension of the present roads by purchase, lease, or otherwise, or take any action as a railroad company that will so divert or injure the said business without such consent.

Thirty-first. This agreement may from time to time be modified, but only with the consent of all the parties hereto.

Thirty-second. Any controversies that may arise between the parties to this agreement or any two of them as to the proper construction and meaning of any of its provisions shall be settled by arbitrators, who shall be appointed in the usual manner, viz., one by the party of the first part, one by the joint action of the parties of the second and third parts; the two to select a third arbitrator. In case of failure upon the part of either company to appoint, ten days after notice, the arbitrator first chosen shall appoint a second, which two shall appoint the third, and the decision of the three arbitrators shall be final and binding.

Thirty-third. This agreement shall take effect on the first
43 day of October, A. D. 1881, and shall remain in force for a term of twenty-five years, unless sooner dissolved by a consolidation of the stocks and securities of the three companies or by the consent of the three contracting parties.

In witness whereof the said parties of the first, second, and third parts hereto have caused these presents to be signed by their respective presidents and the corporate seals, attested by their respect-

ive secretaries, to be hereto affixed this twenty-seventh day of September, A. D. one thousand eight hundred and eighty-one (1881).

THE EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY,
By E. W. COLE, *President.*

[SEAL.]
Attest: B. G. MITCHELL, *Secretary.*

THE NORFOLK AND WESTERN RAILROAD COMPANY,
By GEO. F. TYLER, *President.*

[SEAL.]
Attest: G. R. W. ARMES, *Secretary.*

THE SHENANDOAH VALLEY RAILROAD COMPANY,
By F. J. KIMBALL, *President.*

[SEAL.]
Attest: G. R. W. ARMES, *Secretary.*

44

NEW YORK CITY,
NEW YORK, *September 27th*, 1881.

Whereas a contract has this day been entered into between the East Tennessee, Virginia and Georgia Railroad Company, the Norfolk and Western Railroad Company, and the Shenandoah Valley Railroad Company, by which a joint executive committee representing these companies is provided for;

And whereas the undersigned, E. W. Cole, president of the East Tennessee, Virginia and Georgia Railroad Company, and Frederick J. Kimball, president of the Shenandoah Valley Railroad Company and first vice-president of the Norfolk and Western Railroad Company, have, by their respective companies, been appointed members of this joint executive committee;

And whereas, under and in pursuance of the terms of said contract, they are empowered with authority to appoint a third member of the joint executive committee, and also a general manager of the Virginia, Tennessee and Georgia Air Line:

Now, therefore, by virtue of the authority conferred upon us, we, the undersigned, hereby constitute and appoint Henry Fink, of Lynchburg, Virginia, to be a member with us of the joint executive committee, and also general manager of the Virginia, Tennessee and Georgia Air Line, to take effect on the first day of October, A. D. 1881, with all the rights and powers conferred upon said general manager by the contract between the three companies before referred to.

[SEAL.] E. W. COLE, *President.*
[SEAL.] F. J. KIMBALL,
First Vice-President Norfolk and Western Railroad and President Shenandoah Valley Railroad.

Attest: —— ——,
Secretary to Joint Executive Committee.

(Here follows map marked page 45.)

46 C.

Memorandum of agreement, made and entered into this eleventh day of December, 1883, between the Pennsylvania Railroad Company and other lines under its control east of Erie and Pittsburg, taking *pro rata* divisions, and the Cumberland Valley Railroad Company, for itself and for the roads leased and controlled by it, parties of the first part, the Western Maryland Railroad Company, party of the second part, the Shenandoah Valley Railroad Company, party of the third part, the Norfolk and Western Railroad Company, party of the fourth part, and the East Tennessee, Virginia and Georgia Railroad Company, party of the fifth part.

Whereas it is desired by the several companies parties hereto to establish a fast freight line for the purpose of transporting such freights between Boston, New York, Philadelphia, Baltimore, interior points in Pennsylvania, Maryland, New York, and the New England States and points South accessible by means of the Shenandoah Valley railroad and its Southern connections, as may be for the mutual interest of the parties to this agreement to transport by all-rail line via Roanoke, the understanding being that the agreement is not intended to apply to the transportation of live stock, ores, coal, pig-iron, and similar freight:

Now, therefore, this agreement witnesseth—

First. The line shall be known and designated as "The Great Southern Despatch."

Second. Each member of the line agrees to furnish and set aside for exclusive use in the business herein contemplated to be done its *pro rata* proportion of the necessary freight cars. The bodies of such cars shall be marked "Great Southern Despatch," and the trucks "Roanoke car hoist." The center plates and side
47 bearings of such cars shall be of uniform pattern, so as to admit of the transfer of the bodies of the cars and interchange of trucks at Roanoke car hoist.

A mileage account shall be kept of the cars of each company when used by the other companies, and the balances shall be settled monthly in cash at the rate of three-quarters of a cent per car per mile, of which the company owning the bodies shall receive three-eighths of a cent per car per mile and the owners of the trucks three-eighths of a cent per car per mile.

The interchange of freight cars shall be conducted in accordance with the usage of the Pennsylvania Railroad Company.

Third. The business of the line shall be conducted under the general supervision of a general manager, who shall have the power to appoint a general agent, and such soliciting agents as the parties to this agreement may agree to employ on joint account and at joint expense.

Fourth. A clearing-house shall be established for the purpose of auditing all accounts, revenue, expenditures, and car mileage, and of adjusting all claims for overcharges, loss, and damage, in accordance with such rules and regulations as the general manager shall prescribe. It shall be the duty of the agent of the clearing-house

to render to each company monthly accounts showing its proportion of the joint business and the balances due by and to the companies parties to this agreement on account of such joint business. The agent of the clearing-house shall also render to each company monthly accounts in the form of an account current, accompanied by vouchers showing the disbursements in the settlement of claims for overcharge, loss, and damage to the amount chargeable on account thereof; also the expenses of the line in detail, and each company's share thereof.

48 Fifth. In order to provide a fund for the prompt settlement of claims for loss and damage each company, member of the line, shall deposit and keep on deposit with the agent of the clearing-house the sum of five hundred dollars, which money shall be used by the agent in settlement of claims for which the respective companies may become liable.

Sixth. The companies, parties to this agreement, agree to honor the drafts of the clearing-house for such monthly balances as may become due on account of the settlement of claims: Provided, That such drafts shall be found to be correct and be made not less than ten days after the rendition of the monthly accounts.

Seventh. The through rates of freight and divisions of the same between New England, New York, Philadelphia, and interior points passing over the Pennsylvania railroad and its connections and points south via the Great Southern Despatch shall from time to time be established by agreement between the general manager of the line and the general freight agent of the Pennsylvania Railroad Company.

The through rates of freight and the divisions of the same between Baltimore and points south shall be subject to the agreement of the general freight agent of the Western Maryland Railroad Company: Provided, That the divisions of such rates shall be acceptable to each member of the line: And provided further, That in either case the established rates by other lines with which any member of this line may have made an agreement for the maintenance of rates shall not be cut without the written consent of such member of the line having first been obtained.

Eighth. The business to and from any so-called pooled point shall be conducted in conformity with the agreement and the rules and regulations of the Southern Railway and Steamship Association.

49 Ninth. Any terminal or transfer charges which are necessarily incurred shall be deducted from the through rates before dividing the same between the lines in interest.

Tenth. The Pennsylvania Railroad Company claims and shall be allowed the following maximum terminal charges, it being understood that if any lower charges therefor are made to other parties the Great Southern Despatch shall also have the benefit of such reductions from the same date:

On freights to and from Jersey City (except lighter freight) and points on the united railroads of New Jersey, three and one-half cents (3½c.) per hundred pounds.

On freights to and from New York piers, five (5) cents per hundred pounds.

On freights to and from points in New York harbor other than said piers, fifty-two (52) cents per ton of two thousand pounds, and a Jersey City terminal of two and one-half (2½) cents per hundred pounds.

Eleventh. The Norfolk and Western Railroad Company shall be allowed for transfer at Roanoke a charge not exceeding two (2) cents per hundred pounds.

Twelfth. The Western Maryland Railroad Company shall be allowed the following maximum terminal charges, with the proviso as contained in the tenth section of this agreement:

To and from Hillen, Canton, and points on the Union railroad, Baltimore, two (2) cents per hundred pounds.

Thirteenth. It shall be the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Despatch at its own proper cost and expense.

50 Fourteenth. The general manager of the East Tennessee, Virginia and Georgia Railroad Company shall act as general manager of the Great Southern Despatch Line. He shall render his services free of charge to the line.

Fifteenth. The auditor of the Shenandoah Valley Railroad Company shall act as agent of the clearing-house; his salary shall be three hundred dollars per annum, and he shall have authority to appoint such clerks as may be necessary to properly conduct the business of his office, subject to the approval of the general manager.

Sixteenth. All claims for loss, damage, or overcharge on account of traffic under this agreement which cannot be specifically located shall be paid *pro rata* by the parties in interest in the same manner that the joint revenue from such traffic is apportioned.

Seventeenth. In case of any difference or dispute arising out of any of the matters in this agreement the same shall be submitted for final decision to arbitration in the usual manner.

This agreement shall take effect the first day of January, 1884, and continue in force for the period of one year.

In witness whereof the parties hereto have caused these presents to be signed by their proper representatives on the day and year first above written.

PENNSYLVANIA RAILROAD COMPANY,
By JOHN WHITTAKER, *Ass't Gen'l Freight Agent.*

Signed in the presence of—
FRANK B. GOODALL.

CUMBERLAND VALLEY RAILROAD COMPANY,
By A. L. LANGDON, *Gen'l Fr't Ag't.*

Witness: D. W. MICKLEY.

51 WESTERN MARYLAND RAILROAD COMPANY,
By B. H. GEISWOLD, *Gen'l Fr't Ag't.*

Witness: R. H. VAN PATTON.

SHENANDOAH VALLEY RAILROAD COMPANY,
By CHAS. P. HATCH, *Gen'l Fr't Ag't.*

Witness: CHAS. H. MELLON.

NORFOLK AND WESTERN RAILROAD COMPANY,
By CHAS. P. HATCH, *Gen'l Fr't Ag't.*

Witness: CHAS. H. MELLON.

EAST TENNESSEE, VIRGINIA AND GEORGIA RAILROAD COMPANY,
By J. GOTHARD, *Ass't Gen'l Fr't Ag't.*

Signed in the presence of—
W. V. LOMAX.

D.

Agreement.

Norfolk and Western Railroad Company and Shenandoah Valley Railroad Company with Washington, Ohio and Western Railroad Company, dated January 7th, 1885.

This agreement, made this seventh day of January, 1885, between the Norfolk and Western Railroad Company, of the first part; the Shenandoah Valley Railroad, of the second part, and the Washington, Ohio and Western Railroad Company, of the third part.

Whereas the party of the third part owns and controls a line of railroad extending from Alexandria to Round Hill, Virginia, and desires to secure the extension of said road from Round Hill to a point of connection with the Shenandoah Valley railroad at or near Berryville, in Clarke county;

And whereas, for the purpose of procuring the means necessary to construct and equip said extension, to provide the means for the improvement, equipment, and operation of its road, and for other purposes of the company, the said Washington, Ohio and Western Railroad Company, in pursuance of the power and authority in it duly vested, has resolved to issue and offer for sale its mortgage bonds to the extent of not more than twenty-five thousand dollars per mile of road, constructed and to be constructed, maturing on the first day of February, 1924, and secured by a deed of trust or mortgage to William J. Curtis and Walter G. Oakman, trustees, dated the twenty-eighth day of May, 1884;

52 And whereas the Washington, Ohio and Western Railroad Company, for the purpose of adding to the value of the said bonds and more promptly and advantageously negotiating the same, has requested the parties of the first and second parts to enter into an agreement to provide a fund for the purchase of mortgage bonds, hereinafter designated, secured by said mortgage; and the parties of the first and second parts, in consideration of the covenants to be performed by the party of the third part, have agreed to provide

such fund out of the gross receipts from joint traffic passing over the roads of the parties of the first and second parts, as hereinafter mentioned, to or from the road of the party of the third part in the interchange of business between the parties of the first and second parts or either of them and the party of the third part:

Now, therefore, this agreement witnesseth:

First. That the Washington, Ohio and Western Railroad Company covenants and agrees with the parties of the first and second parts hereto and with each of them that it shall and will, within two years from the date hereof, extend and complete its line of road westward from Round Hill, Loudoun county, Virginia, to a point of connection with the Shenandoah Valley railroad in Clarke county, Virginia, at or near Berryville; otherwise this agreement shall be null and void; that it shall and will construct the said extension in a substantial and workmanlike manner, furnish needful sidings, stations, and facilities, and will properly equip its whole line from Alexandria to such point of connection with the Shenandoah Valley railroad, and have the same in good order and condition for the transaction of both freight and passenger business over the same and the interchange of cars and business between the parties hereto under this contract within two years from the date hereof; and the Washington, Ohio and Western Railroad Company covenants
53 and agrees with the other parties hereto and with each of them during the continuance of this contract to maintain the said railroad, sidings, stations, and other facilities in good order and condition in order to fully accommodate the traffic hereinbefore referred to, and to furnish all necessary additional facilities, side track, and improvements that may be needed from time to time to meet the increased traffic upon the line.

Second. That in consideration of the covenants to be performed by the other parties hereto the Norfolk and Western Railroad Company hereby agrees that during each year after December 31st, 1885, and for the period of twenty years from such date, unless the said bonds should be sooner purchased or the application of the fund herein provided cease under the provisions of this contract, it will set apart, furnishing to the trustees of the said mortgage of the third party hereto an account thereof, during the first five years immediately succeeding December 31st, 1885, twenty per centum, during the next five years fifteen per centum, and for ten years thereafter ten per centum of its gross receipts from all traffic interchanged between the parties of the first and third parts to or from said Washington, Ohio and Western railroad.

Third. In consideration of the like covenants the Shenandoah Valley Railroad Company hereby agrees that during each year after December 31st, 1885, and for the period of twenty years from such date, unless the bonds should be sooner purchased or the application of the fund herein provided cease under the provisions of this contract, it will also in like manner set apart, furnishing to the trustees above mentioned an account thereof, during the first five years immediately succeeding December 31st, 1885, twenty per centum, dur-

ing the next five years fifteen per centum, and for ten years
54 thereafter ten per centum of its gross receipts from all traffic interchanged between the parties of the second and third parts to or from said Washington, Ohio and Western railroad.

Fourth. It is hereby covenanted that the said fund or per centum of the gross earnings so to be contributed as aforesaid shall be applied annually to the purchase of the bonds first issued under the said mortgage, amounting to one million seven hundred and fifty thousand dollars ($1,750,000), being Nos. 1 to 1750, both inclusive, at their lowest market value, not exceeding par and interest for and on account, respectively, of the parties contributing the money therefor, the said trustee to give twenty days' public notice by three insertions in one newspaper in the city of Philadelphia that it will receive proposals from the holders for the sale of said bonds. All bonds so purchased out of the said fund shall be delivered by the trustees to the parties hereto of the first and second parts, respectively, supplying the funds for that purpose in proportion to the amount supplied by each, who shall be subrogated to the rights of the original holders, and the same shall bear interest in their hands and be held by them with the same rights as pertained or pertain to the bonds outstanding in the hands of other holders.

Fifth. The parties of the first and second parts shall and will, on the first day of February, 1887, for the period preceding December 31st, 1886, and annually thereafter until the first day of February, 1906 (if this contract should continue so long in force), on the first day of February in each and every year for the twelve (12) months ending December 31st immediately preceding such first day of February, cause an account to be stated of the gross earnings accruing to each of them on the joint traffic aforesaid and of the proper percentage thereof applicable to the purchase of bonds payable to the
55 trustees under this agreement, and furnish a copy of the same to the party of the third part and to the trustees, and the parties of the first and second parts shall pay over to said trustees the fund aforesaid at the proper times to enable the said trustees to purchase bonds under the terms of this agreement.

Sixth. That the said trustees shall, for the three years immediately succeeding the completion of the extension aforesaid, at the request of the party of the third part, if the party of the third part shall so elect, apply the whole or any part of the fund to the purchase of coupons maturing during said period of three years upon the bonds aforesaid to the extent to which the net earnings of said railroad may be insufficient to pay the same, in which case the provisions of section fifth of this contract shall be carried into effect semi-annually instead of annually, as provided therein, and the coupons so purchased shall be delivered to the parties of the first and second parts, respectively, supplying the funds for the purpose in proportion to the amount supplied by each, who shall be subrogated to the rights of the original holders, and the same shall bear interest in their hands and be held by them with the same rights as pertained to them in the hands of the holders of the bonds to which they were attached. Subject to this right the trustees shall,

during each year, apply said funds to the purchase of one million seven hundred and fifty thousand dollars ($1,750,000) of the said bonds at their market value, not exceeding par and accrued interest thereon, the said bonds being in denominations of one thousand dollars ($1,000) each and numbered from one (1) to seventeen hundred and fifty (1750), both inclusive.

Should the said fund not be required in any year for the purchase of bonds as aforesaid by reason of there being no offers of bonds to the trustees aforesaid the said fund shall to that extent lapse for such year and become the absolute property of the company
56 agreeing to contribute the same; it being understood, however, that any memorandum which may be placed upon said bonds to show that they are entitled to the benefit of purchase by the fund hereinbefore referred to shall be so placed on said bonds that it can be detached and shall be detached by said trustees when they are so purchased and canceled, and said bonds shall not again be entitled to the benefit of the said fund.

Seventh. None of the coupons or bonds so purchased shall be used for the purpose of foreclosing the mortgage or proceeding in any other manner against the party of the third part until five years after the parties of the first and second parts begin the purchase of the same under this agreement, unless such proceedings should be instituted by the holders of other mortgage bonds or coupons for the purpose of selling out the railroad and property of the party of the third part, or unless the said Washington, Ohio and Western Railroad Company fails to pay the principal of or the interest on coupons purchased under the terms of this agreement.

Eighth. It is hereby understood and agreed that the bonds hereinbefore referred to are to be issued subject to the terms and provisions of this contract, and that no sale of the property upon the bonds or upon foreclosure of the mortgage securing the same shall divest said railroad of the terms and provisions of this agreement, but that the parties of the first and second parts shall have the right, at their option, to enforce the provisions of the same, irrespective of any change in the ownership of the said railroad by virtue of proceedings upon said bonds and mortgage aforesaid.

Ninth. It is hereby covenanted and agreed by the parties hereto that they will promote and facilitate the interchange of cars
57 and business between their respective roads; that they will issue coupon tickets for passengers and through bills of lading for freight interchanged between the said lines, and that the earnings from joint business exchanged with the Washington, Ohio and Western railroad shall be apportioned to and between the parties hereto on such a mileage basis as shall be agreed upon between the parties hereto.

Tenth. It being the intent of the parties hereto that their lines shall be worked as far as possible in harmony with each other, the parties of the first and second parts hereto hereby agree that they will, so far as they can consistently with their obligations to other parties, make such arrangements as will promote the development of an interchange of traffic with the party of the third part hereto,

and the parties of the first and second parts respectively covenant and agree that they will receive and promptly transport the traffic originating on or from or to be delivered to the Washington, Ohio and Western railroad and passing over their lines to or towards its destination upon as favorable terms as they accord to any other parties upon like traffic; and the said Washington, Ohio and Western Railroad Company covenants and agrees that it will receive and transport promptly all traffic tendered to it by the parties of the first and second parts or either of them, or lines controlled by them or either of them, and destined to points upon or beyond its line, upon as favorable terms as it accords to any other parties on like traffic.

All parties hereto agree each with the other, as far as they are able to do so consistently with agreements already existing with other lines and the superior interests of their respective companies, to interchange their cars and business with one another as fully as if they were one continuous line controlled by one management, and to place each other on a parity with their own lines and
58 most favored connections in the establishment of time-tables, movement of trains, interchange of cars, running of through lines of sleeping or drawing-room cars, division of revenue, terminal charges, &c., and to furnish one to the other terminal and other proper and adequate transportation facilities, to make reasonable rates of fares and of freight on the business herein contemplated to be done, and do all other things that are usually done by railroads which are in close alliance for the accommodation and full development of their joint traffic.

It is understood and agreed, however, that the party of the third part will send all the traffic controlled by it, and destined to points reached by the lines of the parties of the first and second parts and their connections, via the lines of said parties and their connecting lines, provided that traffic to competitive points is carried over such lines at rates not exceeding the rates then charged by other routes between the same points.

Eleventh. All settlements of accounts between the parties hereto under this agreement and payments of money relating thereto shall be made monthly, except as hereinbefore provided.

Twelfth. This contract may be deposited by the party of the third part with William J. Curtis and Walter G. Oakman for the benefit of the holders of the said first-mortgage bonds hereinbefore designated, and the party of the third part shall have the right to attach to the said first-mortgage bonds, bearing numbers from one to seventeen hundred and fifty, inclusive, or place thereon a statement or memorandum to the effect that each of the said bonds is entitled to the benefit of this agreement, and that upon the purchase thereof under the terms of this agreement the said memorandum is to be detached and canceled by the said trustee, and no bonds once purchased under this agreement shall again be entitled to the benefit of the fund provided for herein.

59 Thirteenth. It is also agreed, in the event of the Baltimore and Potomac Railroad Company, the Philadelphia, Wilmington and Baltimore Railroad Company, and the Alexandria and

Washington Railroad Company entering into a like agreement with the Washington, Ohio and Western Railroad Company for the creation of a fund for the purchase of the first-mortgage bonds above mentioned, that no bond once purchased under either agreement shall be entitled to the benefit of the fund provided by the other, and in that event the memorandum to be placed on said bonds shall so state, and shall in like manner as aforesaid be detached and canceled by the said trustees.

Fourteenth. Nothing in this contract shall be so construed as to restrict the rights of the Washington, Ohio and Western Railroad Company to extend its line beyond its connection with the Shenandoah Valley railroad or to issue other mortgage bonds, but in no event shall this contract apply to any bonds issued by the Washington, Ohio and Western Railroad Company in excess of the $1,750,000 hereinbefore particularly mentioned.

Fifteenth. In case of any difference or dispute arising out of the transactions under this agreement the same shall be submitted to arbitration. Within thirty days after notice shall have been given by either of the parties hereto to the others, there shall be chosen one arbitrator by the parties of the first and second parts, and one by the party of the third part, and these two shall select a third like disinterested and competent party. The three arbitrators so chosen shall examine into the cause of dispute or difference, and the decision of a majority of them shall be final and binding between the parties hereto upon the matter in question. In case either of the said parties shall fail to appoint a referee within the thirty days aforesaid, then and in that event the referee appointed by the party not in default shall appoint a referee for the defaulting party, and the said two referees so appointed shall select a third, and the three so chosen shall hear and decide such differences, their decision, or that of a majority of them, to be final and conclusive between the parties hereto.

In witness whereof the parties hereunto have caused their respective corporate seals to be hereunto affixed, duly attested, the day and year first above written.

NORFOLK AND WESTERN RAILROAD COMPANY,
By F. J. KIMBALL, *President.*
[Seal N. & W. R. R. Co.]
Attest: A. J. HEMPHILL, *Secretary.*

SHENANDOAH VALLEY RAILROAD COMPANY,
By F. J. KIMBALL, *President.*
[Seal S. V. R. R. Co.]
Attest: A. J. HEMPHILL, *Secretary.*

WASHINGTON, OHIO AND WESTERN RAILROAD COMPANY,
By ARCHER N. MARTIN.
[Seal W., O. & W. R. R.]
Attest: CHAS. E. KIMBALL, *Secretary.*

Statement of Through Traffic—i. e., Passenger and Freight—Received by and Delivered to Connecting Railroads, Steamship and Sailing Vessel Lines by the Norfolk and Western Railroad During the Calendar Years 1883 *and* 1884.

Junction points.	Names of connecting lines.	1883.				1884.			
		Number of passengers.		Net tons of freight.		Number of passengers.		Net tons of freight.	
		Received.	Delivered.	Received.	Delivered.	Received.	Delivered.	Received.	Delivered.
Norfolk	Old Dominion S. S. Co.	2,829	1,324	50,411	36,397	1,007	596	53,013	28,642
"	Merchants' and Miners' Trans. Co.	89	79	19,935	45,586	126	72	26,987	39,460
"	Balto. Steam Packet Co.	324	311	33,150	15,594	200	319	29,460	12,807
"	Canton and Clyde Lines.			10,641	13,680			11,221	13,379
"	For export via ocean lines.				25,015				19,699
"	Outside lines							2	24,447
"	Norfolk and Virginia Beach R. R. Co.					227	231		
"	Norfolk Southern R. R. Co.						1		
Suffolk	Seaboard and Roanoke R. R. Co.								1
City Point	Old Dominion S. S. Co.			5,272	8,894	80	33	5,055	8,922
"	Clyde Line			4,905	5,028			2,990	1,548
"	Outside lines							639	5,629
Petersburg	Rich. and Petersburg R. R. Co.	650	2,260			5,486	5,322	4,727	8,035
"	Petersburg R. R. Co.	255	768			86	178	1,547	865
Burkeville	Richmond and Danville R. R. Co.	537	2,600	30,487	25,309	860	946	25,882	33,237
Lynchburg	Virginia Midland R'y Co.	9,080	5,461	2,589	10,790	5,236	4,428	2,191	10,894
"	Rich. and Allegheny R. R. Co.	300	189			897	768	2,588	5,237
Roanoke	Shenandoah Valley R. R. Co.	4,520	5,729	19,681	77,830	5,534	5,677	28,286	48,828
Bristol	East Tenn., Va. & Ga. R. R. Co.	12,396	13,712	215,648	124,019	11,360	12,896	147,461	131,051
		30,980	32,433	392,660	388,143	31,099	31,467	342,049	392,711

Comptroller's Office, Dec. 31, 1885.

62 F.

Statement of "Through" Cotton Shipments.

The cotton shipments of the Norfolk and Western railroad are, with trifling exceptions, received from its southern connections, and are forwarded to mills in the Middle and New England States for domestic consumption or to Norfolk, Baltimore, Philadelphia, and New York for export to England and the Continent of Europe. Cotton is forwarded to northern and northeastern points either by rail to Norfolk and thence by water or by the all-rail route via Roanoke and thence by the Shenandoah Valley railroad and its connections. The following table (in bales) shows the "rail-and-water" and the "all-rail" shipments separately for the three cotton seasons ending August 31st, 1883, 1884, and 1885, respectively:

Bales of Cotton Shipped in Each Cotton Season.

Destinations.	1882–'3.	1883–'4.	1884–'5.
Rail-and-water (via Norfolk) shipments:			
To Maryland points	10,729	4,402	5,598
To Pennsylvania points	9,182	11,171	3,596
To New York city	30,348	19,770	15,168
To New England points	94,562	63,799	62,189
To Norfolk for England and Europe	78,504	61,012	75,985
To Norfolk (local delivery)*	158,131	79,738	63,578
Total	381,456	239,897	226,111
All-rail shipments (via Roanoke):			
To Maryland points	5,428	10,570	15,382
To Pennsylvania points	6,068	3,628	1,199
To New York city	2,868	1,580	473
To New England points	53,221	22,998	17,178
Total	67,584	38,776	34,232
Grand total	449,040	278,673	260,343

* The shipments to Norfolk for local delivery are in very small part for local consumption at Norfolk. On arrival at Norfolk they are chiefly re-consigned for shipment by vessel to coastwise or foreign ports.

63 G.

Statement of "Through" Coal Shipments.

From the coal mines in the Great Flat Top coal field in Virginia

and West Virginia at the terminus of the Norfolk and Western Railroad Company's New River Divison shipments to tide water at Norfolk were made during the years 1883, 1884, and 1885 as follows (tons of 2,000 pounds):

Net tons shipped.	1883.	1884.	1885.*
To Norfolk for shipment by vessel to coastwise and foreign points		20,849	284,413
" " for local delivery	7,944	32,892	60,366
Total	7,944	53,741	344,779

* 1885 shipments are exclusive of December.

NOTE.—The shipments to Norfolk for local delivery comprise a large quantity of coal which is delivered to connecting railroad and steamer lines for their own consumption, and is therefore from this point of view to be considered as through freight.

(Endorsement:) Exhibit D, H. C. D. No. 104. Nov. term, 1883. Deposition of William C. MacDowell. Filed February 1st, 1886. (Finding of facts, &c., by the court of common pleas of Dauphin county.)

64 *Points Submitted in Writing to the Court Below.*

COMMONWEALTH OF PENNA. *vs.* NORFOLK AND WESTERN RAILROAD COMPANY. } In the Court of Common Pleas of Dauphin County. No. 104, November Term, 1883.

First. As the Norfolk and Western Railroad Company did, during the period covered by this suit, invest and use in the State of Pennsylvania a large sum of money, to wit, over eight hundred thousand dollars ($800,000), it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and was not by said section required to obtain an office license or pay a license fee.

Second. If the fee required by the sixteenth section of the act of June 7, 1879, to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section 1 of article IX of the constitution of Pennsylvania, which provides that "all taxes shall be uniform upon the same class of subjects," and is therefore void.

Third. Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section 2 of article IV of the Constitution of the United States, which provides that the "citizens of each State shall be entitled to all the privileges of citizens of the several States."

Fourth. The sixteenth section of the act of June 7, 1879, is an abridgement of the privileges and immunities of citizens of
65 the United States. It discriminates between corporations of the State of Pennsylvania and corporations created by other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons conected with such corporations, particularly this defendant and its officers, agents, and employees, who were in this State maintaining an office and doing business at and before the passage of the said act, the equal protection of the laws; and is for these reasons void, because in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised Statutes, section 1977.

Fifth. Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania or from other States to other States passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section 8 of article I of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce with foreign nations and among the several States."

These points are submitted for the decision of the court, in accordance with the provisions of the act of April 22, 1874.

NORFOLK AND WESTERN
RAILROAD COMPANY,

(Signed) By its attorney, M E. OLMSTED.

(Endorsement:) No. 104. Nov. term, 1883. Commonwealth *vs.* Norfolk & Western Railroad Co. Defendant's points. Filed Feb. 1st, 1886.

66 COMMONWEALTH } Dauphin Common Pleas. No.
vs. } 104, Nov. Term, 1883, & No.
NORFOLK AND WESTERN R. R. Co. } 510, Ap'l Term, 1885.

Appeals from the accounting officers.

By the COURT:

These two cases were tried before the court without a jury under the act of 1874. They present the same questions and will be considered together. We find the facts to be as follows:

1. The defendant is a railroad corporation existing under the laws of the States of Virginia and West Virginia, and its main line and branches lie wholly within these States.

2. Its line of railroad connects at several points with the railroads of other corporations, and, by virtue of these connections and certain traffic contracts and agreements, it has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.

3. Its authorized capital stock is twenty-five millions of dollars.

4. From July 1, 1883, to July 1, 1885, it had an office in this
67 Commonwealth for the use of its officers, stockholders, agents, and employees. Its main office is at Roanoke, Virginia.

5. During this period it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road; but, with trifling exceptions, it owns no property and has no capital invested for corporate purposes within this Commonwealth.

6. It has paid no office license fee for the years named, as required by section sixteen of the act of 1879 (P. L., 120). Upon this section these settlements are based.

The legal questions here are the same as those decided in Com. *vs.* Shenandoah Valley R. R. Co. The defendant's points in each case are refused, and we hold that the Commonwealth is entitled to recover as follows:

In No. 104, Nov. T., 1883:

Amount of settlement	$6,250 00
Attorney general's commission	312 50
Interest, at 12 per cent., from Sept. 14, 1883, to Feb. 1, 1886	1,785 47
Total	$8,347 97

In No. 510, April T., 1885:

Amount of settlement	$6,250 00
Attorney general's commission	312 50
Interest, at 12 per cent., from Dec. 22, 1884, to Feb. 1, 1886	831 28
Total	$7,393 78

For which sums respectively we direct judgment to be entered if exceptions are not filed according to law.

JOHN B. McPHERSON, *A. L. J.*

(Endorsement:) No. 104, Nov. term, 1883. No. 510, Apr'l term, 1885. Commonwealth *vs.* Norfolk & Western R. R. Co. Finding of facts, &c. Filed Feb. 1st, 1886.

68 (*Opinion of the Court of Common Pleas of Dauphin County.*)

COMMONWEALTH *vs.* SHENANDOAH VALLEY R. R. COMPANY.	Dauphin C. P. No. 105, Nov. T., 1883, and No. 509, April Term, 1885. Appeals from Accounting Officers.

By the COURT:

These two cases were tried before the court without a jury under the act of 1874. They present the same questions and will be considered together. We find the facts to be as follows:

1. The defendant is a railroad corporation of the State of Virginia, and under the legislation of that State, in connection with certain legislation of the States of West Virginia and Maryland, it owns and operates a line of railroad extending from Roanoke, Virginia, to Hagerstown, Maryland.

2. This line of railroad connects at several points with the railroads of other corporations, and, by virtue of these connections and certain traffic contracts and agreements, it has become a link in a through line of road, over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth.

3. The authorized capital stock of the defendant is nine millions of dollars.

4. From July 1, 1883, to July 1, 1885, it had an office in this Commonwealth for the use of its officers, stockholders, agents, and employees. Its main office is at Roanoke, Virginia.

5. During this period it expended a considerable amount of money in Pennsylvania for labor and in the purchase of materials and supplies for the use of its road, but, with trifling exceptions, it
69 owns no property and has no capital invested for corporate purposes in this Commonwealth.

6. It has paid no office license fee for the years named, as required by section sixteen of the act of 1879 (P. L., 120). Upon this section these settlements are based.

Our conclusions of law may be briefly stated.

The first, second, fourth, and fifth specifications of appeal in each case are identical with those passed upon by this court and by the supreme court in Conglomerate Mining Co. *vs.* Com'th, 13 W. N. C., 522, and upon the authority of that decision must be overruled.

The third specification in each case denies the validity of the settlement, asserting that the office license fee now in controversy is in conflict with the commercial clause of the Federal Constitution (art. I, sect. 8, clause 4). This question was not decided in the case above cited because no facts were there proved upon which to rest the claim. Certain facts are now proved, as set forth in paragraph two, but we do not think they are sufficient. The defendant is a foreign corporation, carrying freight and passengers upon a line of railroad lying wholly without this Commonwealth. In strictness it has no existence herein, and it certainly does not of itself carry any person

or anything hereinto or hereout. At the end of its road it receives or delivers to or from connecting roads certain freight and passengers, which by said roads are carried into or have been carried out of this State, and it has traffic contracts with these roads which affect such reception and delivery; but since it does not itself transport between Pennsylvania and other points, we are of the opinion that it cannot claim the protection of the commercial clause against the license fee in suit. The view contended for results in this: That as soon as a through freight or passenger line is established by contracts between distinct corporations each corporation in the line is
70 engaged in interstate commerce, so far as through business is concerned, and may establish an office in every State touched or crossed by any part of the line, although that State may have refused the privilege, or may have agreed to grant it only on condition that payment be made therefor.

Thus, the question whether a corporation was engaged in interstate commerce would often depend, not upon the business which it was lawfully doing, but upon its contracts with other corporations, and even upon the good faith with which they were kept. If by contract a "through line" was established and continued to be maintained interstate commerce would exist as to all contracting parties. If there was no such contract, or if it should be broken, there would be no such commerce, save as to the party directly carrying between the States, while in both instances the nature of the business done by each would be the same. We think the existence of connections or of traffic contracts cannot be decisive. If a through line is made up by several distinct corporate agencies each must be judged by the actual corporate business which it actually does; and where, as in this case, it only carried persons or goods over a space which is wholly within one State such carriage is the proper test of its commercial character in an inquiry like this. No doubt in one sense it is engaged in interstate commerce, for it helps to carry from a point in one State to a point in another State, but the meaning of the commercial clause cannot be thus wide. In the same sense it might be said with equal force that a merchant in New York who sells and ships goods to the West is also engaged in interstate commerce because he helps to carry by hauling the goods from his store to the railway station. Surely if no other clause of the Federal Constitution gave him the right to have an office in Pennsylvania the commercial clause alone would not support his claim to enjoy that privilege in the face of hostile legislation by the State.

71 We have been referred to no authority which takes the defendant's view, and we do not think the principle which underlies the commercial clause extends so far. If the chartered power of a corporation embraces commerce between two States it then becomes, of course, an interstate agency, and the question now pressed upon us would require decision; but, while it has no such chartered power, its corporate activity is properly to be exercised within the limits of the sovereignty which gave it being, and its power to act beyond those limits depends, speaking generally, upon the silent or express permission of the sovereignty whose borders it

may desire to cross. We will not decide that the inherent right of a State to exclude foreign corporations or to prescribe the terms upon which they may be admitted can be taken away by a private contract to which it is not a party.

For the purposes of this case we assume that the license fee before us would be a regulation of commerce if sought to be imposed upon a corporation lawfully engaged in the business of interstate transportation. Whether in every case an office license fee would be such a regulation we do not decide. If the view above stated is correct the question does not now arise.

The sixth and seventh specifications in each case assert that the expenditure of money, as set out above in paragraph five, is the investment, use, and employment of a part of defendant's capital in this Commonwealth, within the meaning of the section upon which these settlements stand, and therefore that the defendant is chargeable, not under that section, but only under section four, upon a proper proportion of its capital stock. This question, however, has been ruled against the defendant in Com. *vs.* Standard Oil Co., 101 Pa., 148, and in the second writ of error taken by the Conglomerate Mining Co. (decided in October, 1884), and does not need further discussion.

72 The defendant's points in each case are refused, and we hold that the Commonwealth is entitled to recover as follows:

In No. 105, November term, 1883:

Amount of settlement	$2,250 00
Attorney general's commission	112 50
Interest at 12 per cent. from Sept. 14, 1883, to Feb. 1, 1886	742 70
Total	$3,105 20

In No. 509, April term, 1885:

Amount of settlement	$2,250 00
Attorney general's commission	112 50
Interest at 12 per cent. from December 23, 1884, to February 1, 1886	298 50
Total	$2,660 00

for which amounts respectively we direct judgment to be entered if exceptions are not filed according to law.

JOHN B. McPHERSON, *A. L. J.*

(Endorsement:) No. 104, Nov. term, 1883. No. 510, Apr. term, 1885. Commonwealth *v.* Shenandoah Valley R. R. Co. Same *v.* Norfolk & Western R. R. Co. Opinion filed.

73 *Defendant's Exceptions.*

COMMONWEALTH OF PENNA.
vs.
NORFOLK AND WESTERN R. R. COMPANY.

In the Court of Common Pleas of Dauphin County. No. 104, November Term, 1883.

The above-entitled case having been heard in accordance with the provisions of the act of April 2, 1874, the defendant files the following exceptions to the decision of the court:

1. The court erred in refusing defendant's first point, which was as follows:

Point: "As the Norfolk and Western Railroad Company did, during the period covered by this suit, invest and use in the State of Pennsylvania a large sum of money, to wit, over eight hundred thousand dollars ($800,000), it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and was not by said section required to obtain an office license or pay a license fee."

2. The court erred in refusing defendant's second point, which was as follows:

Point: "If the fee required by the sixteenth section of the act of June 7, 1879, to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section 1 of article IX of the constitution of Pennsylvania, which provides that 'all taxes shall be uniform upon the same class of subjects,' and is therefore void."

3. The court erred in refusing defendant's third point, which was as follows:

Point: "Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania the said sec-
74 tion is in conflict with clause one of section 2 of article IV of the Constitution of the United States, which provides that the 'citizens of each State shall be entitled to all the privileges of citizens of the several States.'"

4. The court erred in refusing defendant's fourth point, which was as follows:

Point: "The sixteenth section of the act of June 7, 1879, is an abridgment of the privileges and immunities of citizens of the United States; it discriminates between corporations of the State of Pennsylvania and corporations created by other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents, and employees, who were in this State maintaining an office and doing business at and before the passage of the said act, the equal protection of the laws, and is for these reasons void, because

in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress—Revised Statutes, section 1977."

5. The court erred in refusing defendant's fifth point, which was as follows:

Point: "Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania or from other States to other States, passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do
75 and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section 8 of article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States."

6. The court erred in allowing interest upon the Commonwealth's claim at the rate of twelve per centum per annum, the said charge of double interest not being warranted by any act of Assembly, or, if it is, then the said act of Assembly being void as imposing a penalty upon defendant for exercising its right of appeal to the courts, in violation of section 11 of article I of the constitution of Pennsylvania.

7. The court erred in directing judgment to be entered in favor of the Commonwealth.

8. The court erred in not directing judgment to be entered in favor of the defendant.

(Signed) M. E. OLMSTED,
Attorney for Defendant.

(Endorsement:) 104. Nov. term, 1883. Commonwealth of Pennsylvania *vs.* Norfolk & Western R. R. Co. Defendant's exceptions. Filed March 2, 1886.

Opinion of Court of Common Pleas of Dauphin County upon Exceptions.

76 COMMONWEALTH *vs.* NORFOLK AND WESTERN R. R. COMPANY. } No. 104. November Term, 1883. Dauphin Common Pleas. Exceptions to Finding, &c.

By the COURT:

The defendant's sixth exception must be sustained, although for a reason not suggested therein or upon the argument, viz., that section sixteen of the act of 1879 was repealed by the act of 1885 (P. L., 9), and no right was reserved to the Commonwealth to collect

any penalties, either by that name or in the shape of interest at twelve per cent. The right to every penalty is therefore gone (Standard Oil Co. *vs.* Com., 101 Pa., 150), and the questions argued become unimportant.

The defendant is in a position like that of the Alliance Coal Co. (13 W. N. C., 324), and is liable for interest only on the footing of an ordinary debtor. In the case of accounts settled this liability is fixed by section thirty-five of the act of 1811 at "interest (*i. e.*, six per cent.) from three months after date of settlement." The calculation heretofore filed must therefore be corrected in accordance with this opinion.

The other exceptions are overruled, and judgment is directed for the Commonwealth for the corrected sum.

(Signed) JOHN B. McPHERSON, *A. L. J.*

(Endorsement:) No. 104. Nov. term, 1883. Commonwealth *v.* Norfolk & Western R. R. Co. Exceptions to finding, &c. Opinion. Filed April 19th, 1886,

77 (*Stenographer's Notes.*)

Dauphin County, Pennsylvania, Court of Common Pleas.

COMMONWEALTH OF PENNSYLVANIA
vs.
NORFOLK AND WESTERN RAILROAD CO. } No. 104. Nov. Term, 1883.

Tried before Hon. John W. Simonton and Hon. John B. M'Pherson—jury dispensed with—at Harrisburg, — a. m., Wednesday, January 6th, 1886.

Appearances: Commonwealth—Attorney general, Lewis C. Cassidy; deputy attorney general, Robert Snodgrass. Defendant—M. E. Olmsted.

Reported and transcribed in compliance with the act of Assembly approved May 8th, 1876.

H. C. Deming, court stenographer.

Index.

Commonwealth:
Offers, 3.
Defendant:
Offers, 3.

HARRISBURG, PA., WEDNESDAY, *January 6th*, 1886—a. m.

Mr. Snodgrass, having opened the case for the Commonwealth, offered in evidence the paper marked "Exhibit A, H. C. D.;"
78 also paper marked "Exhibit B, H. C. D."

Commonwealth rests.

Defendant's counsel offers in evidence the appeal marked "Exhibit C, H. C. D."

Defendant's counsel also offers in evidence affidavit of William C. MacDowell, marked "Exhibit D, H. C. D."

Before the reading of the affidavit Commonwealth's counsel desired to reserve the right to object to the relevancy of any part of the affidavit read.

Defendant's counsel presents points marked "Exhibit E, H. C. D." (Argument.)

(Indorsement:) No. 104. Nov. term, 1883. Notes. Filed Feb. 1st, 1886.

Supreme Court of Pennsylvania Docket Entries.

At a supreme court of the State of Pennsylvania, sitting in and for the middle district of the said court, at the city of Harrisburg, Pennsylvania, on the 21st Monday following the 1st Monday of January, A. D. 1886.

Present: The Honorable Ulysses Mercur, chief justice; Isaac G. Gordon, Edward M. Paxson, John Trunkey, James P. Sterrett, Henry Green, and Silas M. Clark, justices, and William Pearson, prothonotary of the said court.

Among the records of the said supreme court of Pennsyl-
79 vania in and for the middle district, to May term, 1886, No. 21, it is contained as follows, to wit:

Docket Entries.

NORFOLK & WESTERN RAILROAD COMPANY, Defendant Below,
vs.
COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below.

21. Error to the Court of Common Pleas of Dauphin County. No. 104, Nov. Term, 1883.

Olmsted
Costs & tax, $6, paid by Olmsted.

1886, May 14.—Praec., aff., & recog. filed.
Eo die, exit writ of error r't'ble 21 Monday foll. 1 Monday of Jan., 1886.
1886, May 27.—Record returned and filed.
Eo die, assignments of error filed.
1886, June 31.—Argued.
" Oct. 4.—Judgment affirmed, per Green, J.
1886, Oct. 8.—Record remitted per self.
80 1887, Feb. 1.—Petition for allocatur of writ of error from the Supreme Court of the United States.
Allocatur of said writ by Hon. Joseph P. Bradley, justice of said court.
And said writ of error received and filed.
Eo die, citation from said Hon. Joseph P. Bradley and acceptance of service thereof by Robert Snodgrass, deputy attorney general for the Commonwealth of Pennsylvania, and writ of error bond in the sum of $10,000.00 received and filed.

Certified from the record.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1876.]

WILLIAM PEARSON,
Prothonotary.

81 (*Præcipe.*)

NORFOLK & WESTERN R. R. Co., Defendant Below, Plaintiff in Error, *vs.* COMMONWEALTH OF PENNSYLVANIA, Plaintiff Below, Defendant in Error.	In the Supreme Court of Pennsylvania for the Middle District.

Issue writ of error to the court of common pleas of Dauphin county to remove the record and proceedings in a certain action of debt depending therein, to No. 104 of Nov. term, 1883, returnable to May term, 1886.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

To Wm. Pearson, proth'y supreme court of Pa., middle district.

(*Affidavit.*)

PHILADELPHIA COUNTY, *ss:*

Frederick J. Kimball, president of the above-named plaintiff in error, being duly sworn according to law, deposes and says that the writ of error in this case is not intended for delay.

F. J. KIMBALL.

Sworn and subscribed before me this 13 day of May, 1886.

[Seal of W. C. Rodman.]

WALTER C. RODMAN,
Notary Public.

82 In the Supreme Court of Penna. for the Middle District.

NORFOLK & WESTERN R. R. Co., Plaintiff in Error, *vs.* COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.	Surwrit of Error to the Court of Common Pleas for the County of Dauphin, of Nov. Term, 1883, No. 104.

PHILADELPHIA COUNTY, *ss:*

We, the Norfolk & Western R. R. Co., Joseph J. Doran, of Philadelphia, attorney-at-law, and Robert W. Smith, of the city of Philadelphia, severally acknowledge to owe the above-named defendant in error the sum of two hundred dollars, upon condition that the above-named plaintiff in error prosecute its writ of error with effect; and if judgment be affirmed, or the writ of error be discontinued or

non-prossed, to pay the cost adjudged accruing upon such judgment and all other costs that may be awarded upon such writ of error.

NORFOLK & WESTERN R. R. CO.,
By F. J. KIMBALL, *President.*
Attest: A. J. HEMPHILL, *Secretary.*
ROBERT W. SMITH.
JOSEPH J. DORAN.

Taken and acknowledged this 13th day of May, A. D. 1886.

[Seal of W. C. Rodman.]

W. C. RODMAN,
Notary Public.

83 [Endorsed:] No. 21. May term, 1886. Supreme court of Pennsylvania, middle district. Norfolk & Western Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Dauphin county. Præcipe, affidavit, & recognizance for writ of error. Filed May 14, 1886. M. E. Olmsted, attorney for plaintiff in error. (Writ of error.)

84 MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of Supreme Court of Pa., Middle Dist.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Because in the record and process and in rendering the judgment in a certain plaint which was in our said court, before the judges of the same court, by our writ between The Norfolk and Western Railroad Company, plaintiff in error, and The Commonwealth of Pennsylvania, defendant in error, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by complaint of the same plaintiff in error we have received information, we, willing that if any error be therein it should be corrected and that speedy justice be done to the parties in this part, do command you that, if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said Commonwealth, on the 21 Monday foll. 1 Mon. of Jan., 1886, being the 1st Monday of the term, and this writ, that, the record and proceedings aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the Honorable Ulysses Mercur, doctor of laws, chief justice of our supreme court, at Harrisburg, the 14 day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of the Commonwealth the one hundred and tenth.

WILLIAM PEARSON,
Prothonotary.

85 (Endorsement:) No. 21. May term, 1886. Supreme court, middle district. Norfolk and Western Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Writ of error to the court of common pleas for the county of Dauphin. (No. 104. Nov. term, 1883.) Returnable the 21 Monday following the 1 Monday of January, 1886. Rule on the defendant in error to appear and plead on the return day of the writ. N. B.—Ten days' notice to the parties or counsel below is necessary to compel an appearance. Filed in supreme court May 29, 1886. Filed in Dauphin C. P. May 22, 1886. Olmsted.

I certify that recognizance for costs in $200.00, with Robert W. Smith and Joseph S. Doran as bail, has been filed in the supreme court.

WILLIAM PEARSON,
Prothonotary.

The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

J. W. SIMONTON, *P. J.* [SEAL.]

86 *Specification of Errors.*

First. The court erred in refusing defendant's first point, which was as follows:

Point: "As the Norfolk and Western Railroad Company did, during the period covered by this suit, invest and use in the State of Pennsylvania a large sum of money, to wit, over eight hundred thousand dollars ($800,000), it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and was not by said section required to obtain an office license or pay an office fee."

Second. The court erred in refusing defendant's second point, which was as follows:

Point: "If the fee required by the sixteenth section of the act of June 7, 1879, to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section one of article IX of the constitution of Pennsylvania, which provides that 'all taxes shall be uniform upon the same class of subjects,' and is therefore void."

Third. The court erred in refusing defendant's third point, which was as follows:

Point: "Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section two of article IV of the Constitution of the United States, which provides that the 'citizens of each

State shall be entitled to all the privileges of citizens of the several States.'"

87 Fourth. The court erred in refusing defendant's fourth point, which was as follows:

Point: "The sixteenth section of the act of June 7, 1879, is an abridgement of the privileges and immunities of the citizens of the United States; it discriminates between corporations of the State of Pennsylvania and corporations of other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents, and employees, who were in this State maintaining an office and doing business at and before the passage of said act, the equal protection of the laws; and is for these reasons void, because in conflict with article XIV of the amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised Statutes, section 1977."

Fifth. The court erred in refusing defendant's fifth point, which was as follows:

Point: "Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States out of or into the State of Pennsylvania or from other States to other States passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the auditor general thereof a license so to do and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section 8 of article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

Sixth. The court erred in directing judgment to be entered in favor of the Commonwealth.

Seventh. The court erred in not directing judgment to be entered in favor of the Norfolk and Western Railroad Company.

NORFOLK & WESTERN RAILROAD CO.,
By M. E. OLMSTED, *Its Attorney.*

(*Opinion of Supreme Court of Pennsylvania.*)

88 NORFOLK AND WESTERN RAILROAD COMPANY *vs.* THE COMMONWEALTH. } 21, May T., 1886. Error to the Common Pleas of Dauphin County.

GREEN, *J.:*

The very able argument of the learned counsel for the plaintiff

in error has failed to convince us of the correctness of his conclusions. The transportation which this railroad company may lawfully conduct by virtue of its own corporate franchise is not interstate transportation at all, but is confined to territorial limits which are entirely without the State of Pennsylvania. In other words, this company has no corporate franchise to carry any freight or passengers from or to any point in Pennsylvania; hence, as to Pennsylvania, its transportation authorized by its charter cannot be regarded as interstate transportation in any point of view. The through transportation in which it does participate within its own territorial limits is carried on by force of certain contracts into which it has entered with other railroad companies owning their lines of road with which this company connects, and in the sense that the carriage of freight and passengers over such through routes from one State to another is interstate commerce the proportion which this company contributes to such carriage may be regarded as a portion of such commerce; but that is not the sense in which, as we understand it, the commercial clause of the Federal Constitution is to be interpreted when its immunity is invoked by a particular corporation or person engaged in the transportation business. We understand that its protection is extended only to such transportation as is completely and lawfully authorized to be conducted from one State to another. We have carefully examined all the authorities cited for the plaintiff in error and do not find that they, either expressly or inferentially, decide that a local corporation which contributes only its own local right of traffic to a system of through traffic by means of contract arrangements with the local companies can for that reason be permitted to exercise its corporate franchise within a foreign jurisdiction free of such burdens as may be imposed by such foreign jurisdiction upon the theory that it is engaged in interstate commerce. Anything short of this will not suffice for the exigencies of the present case. We concur entirely with the views so lucidly and forcibly expressed by the learned court below in the opinion in the Shenandoah Valley case adopted in this case, and on that opinion, with the brief remarks above expressed, we affirm this judgment.

89

Judgment affirmed.

(Endorsement:) No. 21. May term, 1886. Norfolk & Western R. R. Co. *vs.* Commonwealth of Penna. Error to common pleas of Dauphin county. Judgment affirmed per Green, J. Filed Oct, 4, 1886. (Remittitur.)

90 MIDDLE DISTRICT OF PENNSYLVANIA, *sct:*

[Seal of the Supreme Court of Pennsylvania, Middle District.]

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Dauphin, Greeting:

Whereas, by virtue of our writ of error from our supreme court of Pennsylvania in and for the middle district, returnable in the said court on the 21 Monday *of* foll. 1 Monday of Jan., in the year

of our Lord one thousand eight hundred and eighty-six, a record was brought into the same court of a judgment rendered against The Norfolk and Western Railroad Company, plaintiff in error, at the suit of The Commonwealth of Pennsylvania, defendant in error, and it was so proceeded in our supreme court that the said judgment was affirmed, and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of Assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of C. P. for the county of Dauphin aforesaid, as well for execution or otherwise as to justice shall appertain, wherefore we remit you the record of the judgment aforesaid and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Hon. Ulysses Mercur, chief justice of our supreme court, at Harrisburg, the 8th day of October, in the year of our Lord one thousand eight hundred and eighty-six.

WILLIAM PEARSON,
Prothonotary.

91 (Endorsement:) No. 21. May term, 1886. Supreme court of Pennsylvania. Norfolk & Western Railroad Company, plaintiff in error, *vs.* Commonwealth of Pennsylvania, defendant in error. Remittitur to Dauphin county.

Costs:

Prothonotary	$7 00
Attorney	3 00
Writ (paid by plaintiff in error)	6 00
Amount	$16 00

(Return to Writ of Error from Supreme Court of the United States.)

And now here on this day, to wit, February 1st, 1886, the said The Norfolk & Western Railroad Company produced to the supreme court of Pennsylvania here the writ of the United States of America for the correcting of errors of and upon the said premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington on the second Monday of October next, which writ of error is hereunto annexed.

92 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court of the United States accordingly.

(*Petition for Allocatur.*)

To the Honorable Joseph P. Bradley, justice of the Supreme Court of the United States:

The petition of the Norfolk & Western Railroad Company respectfully showeth—

That your petitioner is a corporation existing under the laws of the States of Virginia and West Virginia, owning a main line of railroad 408 miles in length, extending from Norfolk, Virginia, to Bristol, Tennessee, at which latter place it connects with the line of the East Tennessee, Virginia & Georgia Railroad Company, which owns and controls railroads aggregating 1,500 miles in length, extending into the southern cotton fields and reaching, either directly or by immediate connection, Memphis and other trade centres.

That at Roanoke, Virginia, the Norfolk & Western Railroad Company, your petitioner, connects with the line of the Shenandoah Valley Railroad Company, which extends northward and con-
93 nects at Hagerstown, Maryland, with the Cumberland Valley railroad and the system of railroads owned or controlled by the Pennsylvania Railroad Company.

That your petitioner and other railroad companies entered into an agreement establishing a fast freight line for the purpose of transporting freight between "Boston, New York, Philadelphia, Baltimore, interior points in Pennsylvania, Maryland, New York, and the New England States and points South accessible by means of the Shenandoah Valley railroad and its southern connections," the line thus established being known as the "Great Southern Despatch."

That by various contracts with other railroad companies and steamship companies your petitioner has formed other lines for the through transportation of passengers between the Middle and New England States and the Southern and Southwestern States, said lines being known as the "Kennesaw route," "Shenandoah route," "Virginia, Tennessee & Georgia Air Line," &c.

That a large proportion of the business of your petitioner consists of the transportation of through freight and passengers by means of the lines and connections above shown.

That it was and is impossible for your petitioner to successfully conduct its business of through transportation and to satisfactorily accommodate the through passengers and the shippers of through freight over its lines without having one or more offices in Penn-
sylvania, and that it did, during the period from July 1st,
94 1883, to July 1st, 1884, as well as before and since that date, maintain an office in the Commonwealth of Pennsylvania.

That your petitioner did not obtain from the Commonwealth of Pennsylvania any license to maintain said office.

That the auditor general of said State, claiming to act under the authority of the sixteenth section of an act of the General Assembly of said State approved June 7, 1879, settled an account against your petitioner for $6,250.00 alleged to be due as a license fee for the privi-

lege of maintaining an office in the State of Pennsylvania, being at the rate of one-fourth of one mill upon the authorized capital stock of the company.

That your petitioner appealed from the said settlement of the auditor general to the court of common pleas of Dauphin county, and upon the trial of the case submitted in writing, among others, the following points:

"Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to and from other States out of or into the State of Pennsylvania or from other States to other States passing through the State of Pennsylvania, and for the successful carrying on of said interstate business it is necessary for the company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtain-
95 ing from the auditor general thereof a license so to do and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause 4 of section 8 of article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

That the court of common pleas refused the said point and entered judgment against the company for the amount of the Commonwealth's claim, with costs and commissions added, the amount of the judgment as finally fixed being $7,503.12.

That by writ of error the cause was by your petitioner removed to the supreme court of Pennsylvania, to No. 21, May term, 1886, in the middle district of said court.

That in the supreme court of Pennsylvania your petitioner assigned as error the overruling by the court of common pleas of Dauphin county of the point above stated.

That the supreme court of Pennsylvania has affirmed the judgment of the court of common pleas of Dauphin county, Green, J., who delivered the opinion, saying, *inter alia:*

96 "The through transportation in which it does participate within its own territorial limits is carried on by force of certain contracts into which it has entered with other railroad companies owning their lines of road with which this company connects, and in the sense that the carriage of freight and passengers over such through routes from one State to another is interstate commerce the proportion which this company contributes to such carriage may be regarded as a portion of such commerce; but that is not the sense in which, as we understand it, the commercial clause of the Federal Constitution is to be interpreted when its immunity is invoked by a particular corporation or person engaged in the transportation business. We understand that its protection is extended only to such transportation as is completely and lawfully authorized to be conducted from one State to another. We have carefully examined all the authorities cited for the plaintiff in error and do not find that

they, either expressly or inferentially, decide that a local corporation which contributes only its own local right of traffic to a system of through traffic by means of contract arrangements with the local companies can for that reason be permitted to exercise its corporate franchise within a foreign jurisdiction free of such burdens as may be imposed by such foreign jurisdiction upon the theory that it is engaged in interstate commerce."

97 That the supreme court of Pennsylvania, in which said case was heard and decided, is the highest court of record and the court of last resort in the Commonwealth of Pennsylvania.

That the judgment of the said court is final.

That the judgment of the said court, as already shown, involved the decision of a Federal question, and that said decision is in favor of the State law and against the immunity claimed by your petitioner under the Constitution of the United States.

Wherefore your petitioner (herewith presenting a bond with security for approval) prays that a writ of error may be allowed to issue to the said supreme court of Pennsylvania to bring up the record to the Supreme Court of the United States for correction in that which violates the Constitution and laws thereof, and that the citation to the defendant may accompany the same; and it will ever pray, &c.

NORFOLK & WESTERN RAILROAD COMPANY,
By its attorney, M. E. OLMSTED.

Writ of error is allowed pursuant to the foregoing petition.
Jan. 11th, 1887.

JOSEPH P. BRADLEY,
Asso. Justice Sup. Court U. S.

98 (Endorsement): No. 21. May term, 1886. Norfolk & Western Railroad Company *vs.* The Commonwealth of Pennsylvania. Petition for allocatur. Filed in S. C. of Pa. Feb. 1st, 1887.

(*Writ of Error Bond.*)

Supreme Court of the United States.

NORFOLK & WESTERN RAILROAD COMPANY, Plaintiff in Error, *vs.* COMMONWEALTH OF PENNSYLVANIA, Defendant in Error.	In Error to the Supreme Court of Pennsylvania, Middle District. No. 21. May Term, 1886.

Know all men by these presents that we, the Norfolk & Western Railroad Company, a corporation of the States of Virginia and West Virginia, and Clarence H. Clark, of the city of Philadelphia, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of ten thousand dollars ($10,000.00), lawful money

of the United States of America, to be paid to the said Commonwealth of Pennsylvania or her certain attorney or assigns; to which payment, well and truly to be made, we do bind ourselves and each of us, our heirs, executors, administrators, and successors, firmly by these presents.

Sealed with our seals and dated the thirteenth day of January, A. D. 1887.

99 Whereas lately, in a court of common pleas in and for the county of Dauphin, judgment was entered against the Norfolk & Western Railroad Company at the suit of the Commonwealth of Pennsylvania, of Nov. term, 1883, No. 104, which judgment was afterwards affirmed by the supreme court of the State of Pennsylvania, in a certain plea and suit in said court, of May term, 1886, No. 21, and the said Norfolk & Western Railroad Company have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment entered in the above-entitled suit by the supreme court of Pennsylvania:

Now, the condition of this obligation is such that if the above-named Norfolk & Western Railroad Company, plaintiff in error, shall prosecute its writ of error with effect and answer all damages and costs if it shall fail to make good its plea, then this obligation to be void; otherwise to remain in full force and virtue.

NORFOLK & WESTERN RAILROAD CO.,
By F. J. KIMBALL, *President.*
C. H. CLARK. [SEAL.]

Attest:

[Seal of the Norfolk & Western R. R. Co.]

A. J. HEMPHILL, *Secretary.*

Signed, sealed, and delivered in the presence of—
WALTER C. RODMAN.

Charles H. Clark, the surety above named, being duly
100 sworn according to law, says that he is the owner of property, real and personal, worth, after payment of all his debts and obligations, more than ten thousand dollars ($10,000).

C. H. CLARK.

Sworn and subscribed before me this 14th day of Jan., 1887.

WALTER C. RODMAN,
Notary Public.

This bond is approved Jan. 17th, 1887.

JOSEPH P. BRADLEY,
Associate Justice Supreme Court of the U. S.

(Endorsement:) No. 21. May term, 1886. Norfolk & Western Railroad Company *vs.* Commonwealth of Pennsylvania. Bond. Filed Feb. 1st, 1887.

(*Certificate.*)

STATE OF PENNSYLVANIA, } ss:
County of Dauphin, }

In testimony that the foregoing, contained on pages one to ninety-six, inclusive, is a full, true, and correct copy of the record and proceedings of the supreme court of Pennsylvania, the highest
101 court of law and equity in the State of Pennsylvania, in the case lately depending therein, to No. 21, May term, A. D. 1886, middle district, wherein The Norfolk & Western Railroad Company was plaintiff in error and The Commonwealth of Pennsylvania was defendant in error, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Harrisburg, this ninth day of February, A. D. 1887.

[Seal of the Supreme Court of Pennsylvania, Middle District, 1776.]

WILLIAM PEARSON,
Prothonotary of the Supreme Court of Pennsylvania, Middle District.

Endorsed on cover: Pennsylvania supreme court. No. 294. The Norfolk & Western Railroad Company, plaintiff in error, *vs.* The Commonwealth of Pennsylvania. Filed February 19, 1887.

FILED
MAR 3 1890
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

NO. 294, OCTOBER TERM, 1889.

Norfolk and Western Railroad Company,

Plaintiff in Error,

vs.

The Commonwealth of Pennsylvania.

Writ of Error to Supreme Court of Pennsylvania.

Paper Book of Plaintiff in Error.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

No. 294, OCTOBER TERM, 1889.

THE NORFOLK & WESTERN RAILROAD COMPANY,
(*Plaintiff in Error,*)
vs.
THE COMMONWEALTH OF PENNSYLVANIA.

I. STATEMENT OF THE CASE.

The Atlantic, Mississippi and Ohio Railroad Company becoming insolvent, its property and franchises were sold at judicial sale, in the year 1881, to certain persons, who desired to establish a through line for the transportation of freight and passengers between the Middle and New England States and the Southern and South-western States. The purchasers re-organized the company under the name of the Norfolk and Western Railroad Company, the plaintiff in error in this suit.

Several other railroad companies of Virginia and West Virginia were subsequently consolidated and merged into the Norfolk and Western Railroad Company, which is at present a corporation existing under and by virtue of the laws of the States of Virginia and West Virginia, its lines extending through or into each State, its New River Division reaching into the Pocahontas Flat Top Coal Fields of West Virginia. Its main line is about 408 miles in length, extending from Norfolk, Virginia, to Bristol, Tennessee, at which latter place it connects with the line of the East Tennessee, Virginia and Georgia Railroad Company, which owns and controls railroads aggregating 1,500 miles in length extending into the southern cotton fields, and reaching Memphis, New Orleans, and other trade centers.

The principal office of the Norfolk and Western Railroad Company is at Roanoke, Virginia, where its main line connects with the Shenandoah Valley railroad, which extends northward, and connects at Hagerstown, Maryland, with the Cumberland Valley railroad and the extensive system of railroads owned or controlled by the Pennsylvania Railroad Company. Large sums of money were advanced by the Norfolk and Western Railroad Company and other companies to complete and equip the Shenandoah Valley railroad, which was intended to, and does form, a connecting link in the through line of transportation.

The Norfolk and Western railroad also connects at other points, either directly or by connecting roads, with the system of the Pennsylvania Railroad Company. Shortly after its organization it entered into an agreement with the Pennsylvania Railroad Company, the East Tennessee, Virginia and Georgia Railroad Company, the Shenandoah Valley Railroad Company and the Cumberland Valley Railroad Company "to establish a fast freight line, for the purpose of transporting freight between Boston, New York, Philadelphia, Baltimore, interior points in Pennsylvania, Maryland, New York, and the New England States, and points south, accessible by means of the Shenandoah Valley Railroad and its southern connections."

The line thus established was and is known and operated as the "Great Southern Despatch."

By various contracts between the Norfolk and Western Railroad Company, the Pennsylvania Railroad Company, and other railroad companies, and steamship companies, other lines for through transportation between the Middle and New England States and the Southern and South-western States have been formed, known as the "Kennesaw Route," the "Shenandoah Route," "Virginia Tennessee and Georgia Air Line," &c.

The "Kennesaw Route" is a well-known through line for passengers between the Middle and New England States and

the Southern and Southwestern States, by the cities of Philadelphia, Baltimore, and Washington, thence by way of the Virginia Midland, and Norfolk and Western Railroad, to Bristol, and thence, via the East Tennessee, Virginia and Georgia Railroad, and others, to Nashville, Memphis, New Orleans, and other distant points.

The "Shenandoah Route" is a similiar line, via the cities of Harrisburg, Pa., and Hagerstown, Md., to points south.

Arrangements were made, and were in force during the period covered by this suit, and are still in force, for running through passenger, baggage, and express cars, including Pullman's parlor and sleeping cars, over the through passenger lines named.

In order to accommodate through freight business, new cars were built and complete arrangements perfected whereby the cars of one railroad forming a link of the through lines are forwarded over two or more lines of railroad through several States to destination, so as to facilitate through freight transportation by avoiding transfers from car to car *en route*.

Large sums of money were spent by the Norfolk and Western Railroad Company in perfecting and maintaining said through lines. Similiarly the other railroad and steamship lines also expended various sums of money, and provided various facilities for the promotion of through transportation.

A large proportion of the business of the Norfolk and Western Railroad Company consists of the transportation of through freight and passengers carried continuously by means of the lines and connections above shown, into, out of, or through Pennsylvania.

The main offices of the Pennsylvania Railroad Company and the Clyde line of steamers are in the city of Philadelphia. The Shenandoah Valley Railroad Company has an office there. The Pullman Car Company has there its principal office for the superintendency of the division in which the Norfolk and Western Railroad is placed. Other railroad

companies, whose roads form part of the through lines, have their offices in Philadelphia. The principal producers of iron and miners of coal along the Norfolk and Western Railroad have offices in Philadelphia.

The company desired to make, and has made in Pennsylvania, each year since 1881, extensive purchases of materials and supplies for its lines in Virginia and West Virginia, averaging more than $800,000 per annum.

It was, and is, impossible for the Norfolk and Western Railroad Company to purchase its supplies and successfully conduct its business of through transportation, and satisfactorily accommodate the through passengers and the shippers of through freight over its lines, without having one or more offices in Pennsylvania, and it did, during all of the period covered by this suit, and still does, maintain an office in the city of Philadelphia.

Section 5 of Article XVI of the Constitution of Pennsylvania (adopted in 1873) provides that

"SECTION 5. No foreign corporation shall do any business in this State without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."

The Pennsylvania statute, approved April 22, 1874, (P. L. 108,) in its entirety, reads as follows:

"An Act to prohibit foreign corporations from doing business in Pennsylvania, without having known places of business and authorized agents.

"SECTION 1. *Be it enacted*, &c., That from and after the passage of this act, no foreign corporation shall do any business in this Commonwealth until said corporation shall have established an office or offices and appointed an agent or agents for the transaction of its business therein.

"SECTION 2. It shall not be lawful for any such corporation to do any business in this Commonwealth, until it shall have filed in the office of the Secretary of the Commonwealth a statement, under the seal of said corporation, and signed by the president or secretary thereof, showing the title and object of said corporation, the location of its office or offices, and the name or names

of its authorized agent or agents therein; and the certificate of the Secretary of the Commonwealth, under the seal of the Commonwealth, of the filing of such statement, shall be preserved for public inspection by each of said agents, in each and every of said offices.

"SECTION 3. Any person or persons, agent, officer or employee, of any such foreign corporation, who shall transact any business within this Commonwealth for any such foreign corporation, without the provisions of this act being complied with, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment not exceeding thirty days, and by fine not exceeding one thousand dollars, or either, at the discretion of the court trying the same."

The sixteenth section of the Pennsylvania statute of June 7, 1879, (P. L. 112,) enacts thus:

"SECTION 16. That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth for the use of its officers, stockholders, agents or employees, unless it shall first have obtained from the Auditor General an annual license so to do, and for said license every such corporation shall pay into the State treasury, for the use of the Commonwealth, annually, one fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this State which does pay a tax under any previous section of this act."

The Norfolk and Western Railroad Company, before transacting any business in Pennsylvania, complied with the act of 1874 and obtained from the Secretary of the Commonwealth in 1881 the necessary certificate to enable it to maintain an office in the State. But it never obtained from the Auditor General the license nor paid the license fee required

by the act of 1879. The same facts being true of the Shenandoah Valley Railroad Co., the Auditor General settled accounts against each of them for each of the two years ending July 1, 1885.

As permitted by the statutes relating to the adjustment of public accounts, both companies appealed from the Auditor General's settlements to the Court of Common Pleas of Dauphin County, where the cases were heard by the Court without the intervention of a jury. All the cases were heard upon the same day, and the principal opinion was filed in the case of the Shenandoah Valley Railroad Company.

The case now before this Court involves the claim of the State against the Norfolk and Western R. R. Co. for a license fee for the year ending July 1, 1884, at the rate of one fourth of one mill on its authorized capital stock of $25,000,000. In the trial court the following points were submitted on behalf of the company:

"*First.* As the Norfolk and Western Railroad Company did, during the period covered by this suit, invest and use in the State of Pennsylvania, a large sum of money, to wit: over eight hundred thousand dollars, ($800,000,) it is not within the terms and intendment of the sixteenth section of the act of June 7, 1879, and was not by said section required to obtain an office license or pay a license fee.

"*Second.* If the fee required by the sixteenth section of the act of June 7, 1879, to be paid for an office license shall be construed to be a tax, then the said requirement of the said section is in conflict with section 1, of Article IX, of the Constitution of Pennsylvania, which provides that 'all taxes shall be uniform upon the same class of subjects,' and is, therefore, void.

"*Third.* Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations, and to the officers, agents and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section 2, of Article IV, of the Constitution of the United States, which provides that the 'citizens of each State shall be entitled to all the privileges of citizens of the several States.'

"*Fourth.* The sixteenth section of the act of June 7, 1879, is an abridgment of the privileges and immunities of citizens of the United States. It discriminates between corporations of the State of Pennsylvania and corporations created by other States;

it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents, and employees, who were in this State maintaining an office and doing business, at and before the passage of the said act, the equal protection of the laws, and is, for these reasons, void, because in conflict with Article XIV of the Amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised Statutes, section 1977.

"*Fifth.* Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight and passengers to or from other States, out of, or into the State of Pennsylvania, or from other States to other States, passing through the State of Pennsylvania, and for the successful carrying on of said inter-State business, it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the Auditor General thereof a license so to do, and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section 8, of Article I, of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

These points were overruled, and judgment directed to be entered for $8,347 97, made up of the following items: License fee, $6,250, Attorney General's commission, $312 50, interest at 12 per centum, $1,785 47, total, $8,347 97. The company filed eight exceptions to the finding of the Court, the first five to the overruling of its said five points, and the sixth relating to the question of interest. The sixth only was sustained, all the other exceptions being overruled and final judgment entered for $7,503 12.

The company, by writ of error, carried the case to the Supreme Court of Pennsylvania, assigning as error the refusal of the trial court to sustain its points. The Supreme Court of Pennsylvania having affirmed the judgment of the court of common pleas of Dauphin county, the case is brought here for review.

II. ASSIGNMENT OF ERRORS.

1. The learned Court erred in sustaining the court of common pleas of Dauphin county, refusing the following point submitted by the Norfolk and Western Railroad Company:

Point. "Inasmuch as the sixteenth section of the act of June 7, 1879, denies to foreign corporations and to the officers, agents, and employees of foreign corporations the right to have an office or place of meeting in the State of Pennsylvania, the said section is in conflict with clause one of section two of Article IV of the Constitution of the United States, which provides that the 'citizens of each State shall be entitled to all the privileges of citizens of the several States.'"

2. The learned Court erred in sustaining the court of common pleas of Dauphin county, in refusing the following point submitted by the Norfolk and Western Railroad Company:

Point. "The sixteenth section of the act of June 7, 1871, is an abridgement of the privileges and immunities of the citizens of the United States, it discriminates between corporations of the State of Pennsylvauia and corporations of other States; it discriminates between corporations and natural persons having offices in Pennsylvania; it discriminates between foreign corporations; it denies to foreign corporations and to natural persons connected with such corporations, particularly this defendant and its officers, agents, and employees, who were in this State maintaining an office and doing business at and before the passage of said act, the equal protection of the laws; and is, for these reasons, void, because in conflict with article XIV of the Amendments to the Constitution of the United States, and also because in conflict with the act of Congress, Revised statutes, section 1,977."

3. The learned Court erred in sustaining the court of common pleas of Dauphin county in refusing the following point submitted by the Norfolk and Western Railroad Company:

Point. "Inasmuch as the Norfolk and Western Railroad Company is engaged in the business of transporting freight

and passengers to or from other States out of or into the State of Pennsylvania, or from other States to other States, passing through the State of Pennsylvania, and for the successful carrying on of said inter-State business, it is necessary for the said company to maintain one or more offices in the State of Pennsylvania, therefore the sixteenth section of the act of June 7, 1879, if it requires that the said company cannot lawfully maintain an office in said State without first obtaining from the Auditor General thereof a license so to do, and paying the fee prescribed by said section for said license, then the said section is unconstitutional and void, because in conflict with clause four of section eight of Article I of the Constitution of the United States, which provides that 'Congress shall have power to regulate commerce with foreign nations and among the several States.'"

4. The learned Court erred in affirming the judgment of the court of common pleas of Dauphin county in favor of the Commonwealth of Pennsylvania, and against the Norfolk and Western Railroad Company.

5. The learned Court erred in not reversing the judgment of the court of common pleas of Dauphin county.

III. ARGUMENT FOR PLAINTIFF IN ERROR.

The business which requires the Norfolk and Western Railroad Company to maintain, in Pennsylvania, the office for which a license fee of $6,250 per annum is demanded, is inter-State commerce.

It may safely be conceded that the decisions of this Court in *Bank of Augusta* v. *Earle*, *13 Peters*, *519*, and *Paul* v. *Virginia*, *8 Wall.*, *168*, are authority for the position that corporations are not citizens within the meaning of that clause of the Constitution of the United States which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" that they are purely creatures of the law of the State which created them, and where that law ceases to operate, have no absolute right of recognition, but for the right to do business through their agents and to enforce their contracts in other States are dependent upon the assent of those States, which may be withheld entirely, or given upon such conditions as the States may see fit to impose, subject, however, to certain important qualifications, one of which is clearly pointed out by Mr. Justice Field in the latter of the two cases named. The corporations there involved were insurance companies. It had been argued by counsel that the right of the States to exclude corporations of other States, or to impose conditions upon their right to do business, did not extend to those engaged in inter-State commerce, and that the business of insurance was commerce. The soundness of the first part of the proposition was affirmed by this Court, but the latter was denied, the learned Justice saying, (pp. 182, 183):

"We proceed to the second objection urged to the validity of the Virginia statute, which is founded upon the commercial clause of the Constitution. It is undoubtedly true, as stated by

counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. At the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations. The East India Company, the Hudson's Bay Company, the Hamburgh Company, the Levant Company, and the Virginia Company, may be named among the many corporations then in existence, which acquired from the extent of their operations, celebrity throughout the commercial world. This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general, and includes alike commerce by individuals, partnerships, associations, and corporations. There is, therefore, nothing in the fact that the insurance companies of New York are corporations to impair the force of the argument of counsel. The defect of the argument lies in the character of their business. Issuing a policy of insurance is not a transaction of commerce."

This Court had already said, in *Lafayette Insurance Co.* v. *French*, *18 Howard*, *404*, referring to *Bank of Augusta* v. *Earle*, that the conditions imposed by a State upon the transactions of business within her borders by foreign corporations "must be deemed valid and effectual by other States and by this Court, *provided they are not repugnant to the Constitution or laws of the United States*," and the language of Mr. Justice Field pointed out circumstances under which any conditions might be repugnant to the organic law.

In *Ducat* v. *Chicago*, *10 Wall.*, *410*, Mr. Justice Nelson said:

"The power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, is clearly established in the case we have referred to, as it also had been in the previous case of *Augusta* v. *Earle*. As to the nature or degree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union. We find no such limitations in this case."

In *Insurance Co.* v. *Morse*, *20 Wall.*, *445*, it was held that the condition imposed by the State of Wisconsin, that foreign

insurance companies, before doing business therein, must agree not to remove suits for trial into the United States circuit court was repugnant to the Constitution of the United States, and therefore void. Mr. Justice Hunt, in delivering the opinion of this Court, reviewed all of the opinions which have thus far been cited in this argument, and on page 457 said:

"None of the cases so much as intimate that conditions may be imposed which are repugnant to the Constitution and laws of the United States, nor inconsistent with rules of public law which secure the jurisdiction and authority of each State from encroachment by others."

In *State of Indiana* v. *Pullman Palace Car Co., 16 Fed. Rep., 193*, Gresham, J., declared unconstitutional an Indiana State statute imposing taxes on the gross receipts of foreign sleeping car companies conveying passengers to, from, and through that State, saying (p. 200):

"Commerce between the States, whether carried on by individuals or corporations, is under the regulation of Congress. A State may exclude from its jurisdiction corporations of other States not engaged in inter-State commerce. The right of exclusion cannot be exercised against corporations of other States thus engaged, any more than against individuals.—*Paul* v. *Virginia, 8 Wall., 168.*"

In *Cooper Manufacturing Co.* v. *Ferguson, 113 U. S., 727* this Court, Mr. Justice Wood delivering the opinion, held that a corporation of Ohio, did not, by doing a single act of business in Colorado, namely, entering into a contract in writing made in said State of Colorado, with certain citizens of that State to make and deliver to them on the cars at Mount Vernon, Ohio, a steam engine and other machinery, come within the provisions of the Colorado statute providing that no foreign corporation should do any business within the State without filing in the office of the Secretary of State, a certificate designating the number of places where the business of the corporation should be carried on, naming its authorized agents in the State residing at its principal place of

business, &c. Mr. Justice Matthews and Mr. Justice Blatchford concurred in the judgment of the Court, but united in a separate opinion in which they held that the transaction involved was commerce, and could not be prohibited by the law of any State. Said they, (p. 736):

"Whatever power may be conceded to a State, to prescribe conditions on which foreign corporations may transact business within its limits, it cannot be admitted to extend so far as to prohibit or regulate commerce among the States; for that would be to invade the jurisdiction which, by the terms of the Constitution of the United States, is conferred exclusively upon Congress."

In *Gloucester Ferry Co.* v. *Pennsylvania, 114 U. S., 196,* the Supreme Court of Pennsylvania had held that, under a statute of that State requiring domestic as well as foreign corporations doing business therein to pay a tax upon their capital stock, a corporation of New Jersey was taxable because it was found to be doing business in Pennsylvania. This Court, however, declared otherwise, upon the ground that the business which, under the terms of the statute, made the company taxable upon its capital stock was that of landing or receiving at a slip or dock in Philadelphia freight and passengers either brought from or intended to be carried to Gloucester, New Jersey. It was held that such landing and receiving of passengers was incident to their inter-State transportation, and that, as stated in the syllabus, "Inter-State commerce by a corporation is entitled to the same protection against State exaction which is given to such commerce when carried on by individuals." And Mr. Justice Field, who delivered the opinion of the Court, said:

"It needs no argument to show that the commerce with foreign nations and between the States, which consists in the transportation of persons and property between them, is a subject of national character, and requires uniformity of regulation. Congress alone, therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burden imposed by State legislation. Otherwise there would be no protection against conflicting regulations of different States, each

legislating in favor of its own citizens and products, and against those of other States. It was from apprehension of such conflicting and discriminating State legislation, and to secure uniformity of regulation, that the power to regulate commerce with foreign nations and among the States was vested in Congress.

"Nor does it make any difference whether such commerce is carried on by individuals or by corporations. *Welton* v. *Missouri, 91 U. S., 276; Mobile* v. *Kimball, 102 U. S., 691.* As was said in *Paul* v. *Virginia, 8 Wall., 168*, at the time of the formation of the Constitution a large part of the commerce of the world was carried on by corporations; and the East India Company, the Hudson Bay Company, the Hamburg Company, the Levant Company, and the Virginia Company were mentioned as among the corporations which, from the extent of their operations, had become celebrated throughout the commercial world. The grant of power is general in its terms, making no reference to the agencies by which commerce may be carried on. It includes commerce by whomsoever conducted, whether by individuals or by corporations. At the present day nearly all enterprise of a commercial character requiring for their successful management large expenditures of money are conducted by corporations."

This language of Mr. Justice Field is referred to approvingly in *Philadelphia & Southern Steamship Co.* v. *Pennsylvania, 122 U. S., 326*, and quoted at length by Mr. Justice Bradley, who adds, (p. 344):

"It is hardly necessary to add that the tax on the capital stock of the New Jersey Company, in that case, was decided to be unconstitutional, because, as the corporation was a foreign one, the tax could only be construed as a tax for the privilege or franchise of carrying on its business, and that business was inter-State commerce.

"The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of inter-State commerce carried on by corporations, apply equally to domestic and foreign corporations. No doubt the capital stock of the former, regarded as inhabitants of the State, or their property, may be taxed as other corporations and inhabitants are, provided no discrimination be made against them as corporations carrying on foreign or inter-State commerce, so as to make the tax, in effect, a tax on such commerce. But their business as carriers in foreign or inter-State commerce cannot be taxed by the State, under the plea that they are exercising a franchise."

And the same distinguished jurist, in *Stockton* v. *Baltimore & N. Y. R. Co., 32 Fed. Rep., 9*, said, (p. 14):

"It is undoubtedly just and proper that foreign corporations should be subject to the legitimate police regulations of the State, and should have, if required, an agent in the State to accept service of process when sued for acts done, or contracts made therein. In reference to some branches of business, like those of banking and insurance, which affect the people at large, they may be also subject to more stringent regulations for the security of the public, and may even be prohibited from pursuing them, except upon such terms and conditions not unlawful in themselves as the State chooses to impose. But in the pursuit of business authorized by the government of the United States and under its protection, the corporations of other States cannot be prohibited or obstructed by any State. If Congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union. And in carrying on foreign and inter-State commerce, corporations equally with individuals are within the protection of the commercial power of Congress and cannot be molested in another State by State burdens and impediments. This was held and decided in the case of *Gloucester Ferry Co.* v. *Pennsylvania*, *114 U. S., 204, 5 Sup. Ct. Rep., 826*, and affirmed in the recent case of *Philadelphia S. S. Co.* v. *Pennsylvania*, *122 U. S., 326, 7 Sup. Ct. Rep., 1118;* and although the decision in *Paul* v. *Virginia*, *8 Wall., 168*, conformed to the doctrine of *Augusta Bank* v. *Earle*, the following striking language was used by the Court, to wit."

He then quotes language which has already been printed in this argument (p. 11) and adds:

"We may fairly supplement this language by adding that, when the Constitution was adopted, it could not have been supposed that the regulations of commerce to be made by Congress might be of no avail to commercial corporations, or, at least, might be rendered nugatory with regard to them, in consequence of State restrictions upon their power to act as corporations in any other State than that of their origin."

The same statute of Pennsylvania, which is here involved, was before this Court for consideration in *Pembina Mining Co.* v. *Pennsylvania*, *125 U. S., 181*, and it was there held, as stated in the syllabus, that

"The exaction of a license fee by a State to enable a corporation organized under the laws of another State to have an office within its limits for the use of the officers, stockholders, agents, or employees of the corporation, does not infringe upon the com-

mercial clause of the Federal Constitution, (Article I, section VIII, clause 3,) provided the corporation is neither engaged in carrying on foreign or inter-State commerce, nor employed by the government of the United States."

The Pembina Company was not engaged in inter-State commerce. It had an office in Philadelphia, and it was engaged in "carrying on a general mining and milling business" in Colorado. Mr. Justice Field, who delivered the opinion of the Court, was careful to note the exceptions to the general doctrine of *Paul* v. *Virginia*, as declared in *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, and *Stockton* v. *Balt. & N. Y. R. R. Co.*, *supra*, and said, (p. 186):

"These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or inter-State commerce, or not employed by the government. As to these corporations, the doctrine of *Paul* v. *Virginia* applies. The Colorado corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employees, was a matter dependent on the will of the State."

He was most particular to restrict the decision and the language of the opinion in the Pembina case to corporations not engaged in inter-State or foreign commerce, as may be seen from his concluding paragraph, which is as follows:

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, inter-State or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority."

In *Leloup* v. *Port of Mobile*, *127 U. S., 640*, the plaintiff had been convicted and fined for acting as the agent, at the Port of Mobile, Alabama, of the Western Union Telegraph Company, a corporation of the State of New York, which company had not complied with an ordinance requiring telegraph

companies to obtain an annual license and pay therefor the sum of $225. This Court, however, reversed the proceedings, and declared, perhaps with more emphasis than ever before, the total and complete exemption of inter-State and foreign commerce from regulation or interference by the States in any form whatever. Said Mr. Justice Bradley, who delivered the opinion, (p. 645):

"The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another, and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the act of Congress, passed July 24, 1866, and other acts incorporated in Title LXV of the Revised Statutes? Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax, and procure a license for the privilege? If it can, it can exclude such companies and prohibit the transaction of such business altogether. We are not prepared to say that this can be done."

He declares that the decision in the similar case of *Osborne* v. *Mobile, 16 Wall., 479*, is not in harmony with subsequent decisions of this Court; that within the past fifteen years a great number and variety of cases involving the commercial power of Congress had made it necessary for the Court to re-examine the whole subject with care, and lays it down as the deliberate conclusion of the Court—

"That no State has the right to lay a tax on inter-State commerce in any form, whether by way of duties laid on the transportation of the subject of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In view of these decisions it seems clear that Pennsylvania cannot exclude nor impose conditions upon corporations of other States which are engaged in inter-State or foreign commerce. This much was, indeed, practically conceded by the learned judge of the trial court, who said, (record, 42):

"For the purposes of this case we assume that the license fee before us would be a regulation of commerce if sought to be imposed upon a corporation lawfully engaged in the business of inter-State transportation."

But he holds that this corporation is not so engaged. He says, (Record, p. 41):

"If a through line is made up of several distinct corporate agencies, each must be judged by the actual corporate business which it actually does; and where, as in this case, it only carried persons or goods over a space which is wholly within one State, such carriage is the proper test of its commercial character in an inquiry like this. No doubt in one sense it is engaged in inter-State commerce, for it helps to carry from a point in one State to a point in another State, but the meaning of the commercial cause cannot be thus wide."

And again:

"If the chartered power of a corporation embraces commerce between two States it then becomes, of course, an inter-State agency, and the question now pressed upon us would require decision; but, while it has no such chartered power, its corporate activity is properly to be exercised within the limits of the sovereignty which gave it being, and its power to act beyond those limits depends, speaking generally, upon the silent or express permission of the sovereignty whose borders it may desire to cross. We will not decide that the inherent right of a State to exclude foreign corporations or to prescribe the terms upon which they may be admitted can be taken away by a private contract to which it is not a party."

That language was used in the case of the Shenandoah Valley Railroad Company, which is a corporation of the States of West Virginia and Maryland, its railroad extending from Roanoke, Virginia, to Hagerstown, Maryland, and is adopted and applied to the case of the Norfolk & Western Railroad Company, which is a corporation of the States of Virginia and West Virginia, its own railroad crossing the line between the two States. Both these companies are, therefore, clearly inter-State agencies, even within the definition of the learned Judge. His meaning doubtless is that a foreign railroad company having no railroad and no au-

thority to build one in Pennsylvania, cannot, by means of contracts with other corporations which do own railroads in Pennsylvania, engage in inter-State transportation over, upon, and by means of those railroads in the face of prohibitory legislation by the State in which they are located.

To the same effect is the language of the learned Judge who delivered the opinion of the Supreme Court of Pennsylvania, (Record, p. 51):

"The transportation which this railroad company may lawfully conduct by virtue of its own corporate franchise is not inter-State transportation at all, but is confined to territorial limits which are entirely without the State of Pennsylvania. In other words, this company has no corporate franchise to carry any freight or passengers from or to any point in Pennsylvania; hence, as to Pennsylvania, its transportation authorized by its charter cannot be regarded as inter-State transportation in any point of view. The thorough transportation in which it does participate within its own territorial limits is carried on by force of certain contracts into which it has entered with other railroad companies owning their lines of road with which this company connects, and in the sense that the carriage of freight and passengers over such through routes from one State to another is inter-State commerce, the proportion which this company contributes to such carriage may be regarded as a portion of such commerce; but that is not the sense in which, as we understand it, the commercial clause of the Federal Constitution is to be interpreted when its immunity is invoked by a particular corporation or person engaged in the transportation business. We understand that its protection is extended only to such transportation as is completely and lawfully authorized to be conducted from one State to another. We have carefully examined all the authorities cited for the plaintiff in error, and do not find that they, either expressly or inferentially, decide that a local corporation which contributes only its own local right of traffic to a system of through traffic by means of contract arrangements with the local companies, can, for that reason, be permitted to exercise its corporate franchise within a foreign jurisdiction free of such burdens as may be imposed by such foreign jurisdiction, upon the theory that it is engaged in inter-State commerce."

As no railroad of any importance can be constructed without the exercise of the right of eminent domain, and as the exercise of that power in Pennsylvania can be granted only by the State of Pennsylvania, this is equivalent to a decla-

ration that the State may prohibit foreign corporations from carrying on inter-State transportation by rail within her territory. It is respectfully submitted that every railroad company is, by virtue of its general powers as a railroad company, authorized and required to contract for, and engage in the transportation of freight and passengers beyond its own lines upon the lines of other companies, even though they extend into other States, and that when the transportation in which it thus engages crosses State lines, it is protected by the commercial clause of the Constitution from regulation or interference by the State.

In *Lock Company* vs. *Railroad Company, 48 New Hampshire, 339–363*, three railroad corporations as stated by Perley, C. J., delivering the opinion of the Court, "were engaged as common carriers in the business of transporting goods between Nashua (New Hampshire) and New York, in a continuous line under an agreement under which they divided the price paid for transportation through, in proportions fixed by the agreement."

It was contended on behalf of one of the railroad companies that it had no power to contract for the transportation of goods beyond the terminus of its own railway, such power not being conferred by statute and not being incident or necessary to, the exercise of the powers conferred. Upon this point the chief justice said, (page 345):

"Had defendant corporate authority to contract for the transportation of the goods beyond their own line? We have no hesitation in holding that railroads may contract to carry goods and passengers beyond their own lines. They could not answer the main objects of their incorporation without the exercise of this power. They are laid out and established with reference to connections in business with other extended lines of transportation, and the power to contract for transportation over the connected lines is implied in the general grant of corporate authority. On this point the authorities are nearly unanimous."

It was held that the defendant corporation, having received goods and billed them to a point beyond the termination of its own road, was bound to carry them, or see that they were

carried, and that it was liable for an accidental loss happening upon a part of the connected line, but not upon its own road.

In *Bradford* v. *The Railroad Company, 7 Rich., 201*, it was held that

"An advertisement of a through line and the course of the business is evidence to charge all the roads engaged in the continuous line of transportation as jointly liable for carriage through the whole route."

In 2 *Redfield on Railways, 104*, the learned author sums up the result of the American cases on this point, as follows:

"The American cases on the subject, with rare exceptions, recognize the right of a railroad company to enter into special contracts to carry goods beyond the line of their road; and where different roads are united in one continuous route such an undertaking, when goods are received and booked for any part of the line, is almost a matter of course."

In *Wyman* v. *Chicago & Alton Railroad Company, 4 Missouri Appeal*, Hayden, J., delivering the opinion of the Court, said:

"It is now well settled that railroad corporations have an authority to contract for the transportation of passengers and goods beyond their own lines, *and beyond the limits of their respective States;* that the power is implied in their general corporative powers. * * * * * It may be regarded as equally well settled, upon authority, that if several common carriers, having each its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price, which the shipper or consignee pays in one sum, and which the carriers divide among them, then as to third parties with whom they contract, they are liable jointly for a loss taking place on any part of the whole line."

That was a case in which a number of railroad companies of different States had formed what was known as the "Blue Line," for the purpose of running cars directly through from Boston and New York to St. Louis, and transporting goods without change of cars. It was decided that each of the companies forming the line was liable for losses taking place on any part of the whole line.

In *Stewart* v. *Erie & Western Transportation Company, 17 Minnesota, 372*, a railroad company of Minnesota had entered into an agreement with the defendant, a steamboat transportation company of the State of Pennsylvania, for the transportation of through freight by rail and water, from Saint Paul to Detroit, and other Lake Erie Ports. A stockholder of the railroad company attacked this contract as beyond the power of the railroad company to make, and therefore illegal and void. But it was sustained, the Court, Berry, J., page 386, quoting and indorsing the language of appellant's counsel, as follows:

"It is not only the right, it is the duty of every railroad company to increase its business by all the usual and customary means, and furnish its patron, the public, with all needful facilities for safe, cheap, and speedy transportation. If, therefore, this railroad company had not attempted to provide any means of conveyance from and to its lake terminus at Duluth, it would have neglected the interest of its stockholders and been justly censurable as indifferent to the necessities of the case, the convenience of the general public, and the pecuniary welfare of the citizens of Minnesota. *It was its duty to secure the benefits of through business.*"

These remarks, he adds, are to be taken subject to the qualification that the company must possess requisite authority. But he finds that

"In view of the present mode of transacting business of this kind, it would seem to be an incident of railroad corporations, unless withheld by the terms of their charters."

In *Railroad Company* v. *Pratt, 22 Wall., 123*, a number of railroad companies formed a through line, and the Ogdensburg and Lake Champlain Railroad Company, was held liable for a loss occurring to freight which did not pass over any portion of its own road. The question "as to the power of the railroad company to contract as a common carrier for the transportation of property beyond the terminus of its own road," was distinctly and clearly raised, and Mr. Justice Hunt, delivering the opinion of this Court, said:

"Assuming the case to stand upon the general principles applicable to the question, the doctrine that a railroad company may subject itself to the obligations of a carrier beyond its own line, has been distinctly held in the State of New York, where this contract was made; in the State of Massachusetts, where its performance was to be completed, and in the State of Vermont, where the alleged injury occurred.

"In the case of *Burtis* v. *Buffalo and Saint Lawrence Railroad, 24 New York, 269, it was held that this principle applied to connecting roads extending beyond the limits of the State.* The single exception to this holding, so far as we are aware, is in the State of Connecticut, where the contrary has been held by the Supreme Court."

He defines the difference between railroad companies which make no special contract to carry beyond their own line, and to deliver to the next carrier in the route beyond, and companies which, by agreement, form a through line of transportation. Where no such agreement is made, each company is liable only for transportation over its own line; but where a contract is made for through transportation, each of the parties to it is held to be a common carrier for the entire distance, with precisely the same effect as if the whole length of the road were its own.

In *Railway Co.* v. *McCarthy, 96 U. S., 258*, this Court decided that, as stated in the syllabus:

"Unless forbidden by its charter, a railroad company may contract for a shipment over connecting lines; and, having done so, is liable in all respects upon them as upon its own lines. In such a case the shipper is authorized to assume that it has made the requisite arrangements to fulfill its obligations."

The Ohio and Mississippi Railway Company having contracted with McCarthy for the shipment of sixteen cars of cattle from East St. Louis to Philadelphia, was held liable for damages sustained by the cattle after they had passed beyond the end of its own road, namely upon the railroad of the Marietta and Cincinnati Railroad Company, and also upon the line of the Baltimore and Ohio Railroad Company. Mr. Justice Swayne, who delivered the opinion of the Court, said, (p. 266):

"Such corporations, unless forbidden by their charters, have the power to contract for shipments the entire distance over any connecting lines. *Railroad Company* v. *Pratt*, (*22 Wall., 123,*) is conclusive in this court upon the subject. The principle is so well settled in this country that a further citation of authorities in support of it is unnecessary. Such is also the rule of the English law. Both here and there the company is liable in all respects upon the other lines as upon its own. In such cases the public has a right to assume that the contracting company has made all the arrangements necessary to the fulfillment of the obligations it has assumed. *The Great Western Railway Co.* v. *Blake*, *7 H. & N., 986; Weed* v. *Railroad Company*, *19 Wend.*, (*N. Y.,*) *534; Knight* v. *Portland, Saco & Portsmouth Railroad Co.*, *56 Me., 234.* When a contract is not on its face necessarily beyond the scope of the power of the corporation by which it was made, it will, in the absence of proof to the contrary, be presumed to be valid. Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong."

The Supreme Court of Pennsylvania recognized this doctrine long since in *Baltimore & Philadelphia Steamboat Co.* v. *Brown*, *54 Pa. St., 77*, where it was decided, as stated in the syllabus, that "A transportion company may make a contract for carrying beyond their line, and is responsible for the carriage of goods contracted for." The agent for the plaintiff in error had contracted for the shipment of goods from Philadelphia to Fortress Monroe. Beyond Baltimore the transportation was usually effected by the Baltimore Steam Packet Company, a connecting line. During that part of the journey the goods were lost. The point was urged that the agent of the Baltimore and Philadelphia Company had no authority to contract for carriage beyond its line, but the Court held that his authority was good as to any contract which the company itself was authorized to make, and that the company was authorized to contract for carriage beyond its own line. Upon this point Thompson, J., saying, (p. 83):

"But it is said the contract could not be made by the authority of the company, for it was ultra the defendants' line. We do not think this objection good, more especially when the contracting line is in business connection with a line doing busi-

ness to the extent of the transit engaged, as was the case here. Between freighter and carrier such an objection cannot avail. We know of no positive law against it, and see no reason arising out of the ordinary powers of the company why it should not be so. Had there been any special clause in the charter, the question might have been different; but none such was alleged or shown. We certainly see no policy in the law that is violated by such contracts, but, on the contrary, great convenience by holding them valid."

To a similar effect is *Chouteaux* v. *Leech*, *18 Pa. St.*, *224*.

It thus appears from the decisions of this Court and of the Supreme Court of Pennsylvania, that the Norfolk & Western Railroad Company may lawfully, by virtue of its own corporate franchises, contract for and engage in transportation beyond its own lines, and beyond the limits of the two States from which its corporate existence is derived.

But even if the authority of the company to contract for transportation were confined to the limits of the State or States in which its railroads are located, it is respectfully submitted that, nevertheless, as to freight and passengers received upon its road from, or intended to be delivered in, other States the law is not as held by the Pennsylvania Court. On the contrary, the protection of the commercial clause of the Federal Constitution does afford immunity to such transportation.

In the case of the *Daniel Ball*, *10 Wall.*, *557*, there was before this Court the case of a steamer plying upon the Grand river wholly within the State of Michigan, not running in connection with or continuation of any line of steamers or other vessels or railway line leading from or to another State. It was there held that as to packages taken upon the steamer and marked for ports and places in States other than Michigan, the State had no power to regulate such commerce, but the power of Congress was supreme and exclusive. Mr. Justice Field, who delivered the opinion of the Court, said, (p. 565):

"But inasmuch as her agency in the transportation was entirely within the limits of the State, and she did not run in con-

nection with, or in continuation of, any line of vessels or railway leading to other States, it is contended that she was engaged entirely in domestic commerce. But this conclusion does not follow. So far as she was employed in transporting goods destined for other States or goods brought from without the limits of Michigan and destined to places within that State, she was engaged in commerce between the States, and however limited that commerce may have been, she was, so far as it went, subject to the legislation of Congress. She was employed as an instrument of that commerce; *for whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.* The fact that several different and independent agencies are employed in transporting the commodity, some acting entirely in one State, and some acting through two more or States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress."

In the *Case of the State Freight Tax, 15 Wall., 232,* (*Phila. & Reading R. R. Co.* v. *Pennsylvania,*) a tax upon coal shipped from the mines in Pennsylvania to Port Richmond, in Pennsylvania, upon a road whose whole length was within the State, was declared unconstitutional, because it was, when it left the mines, intended for exportation to points beyond the State, and was, at Port Richmond, transferred into vessels destined for such points.

See also *Wabash, &c., R'y Co.* v. *Illinois, 118* U. S., *557,* and numerous cases there cited.

But the transportation of the Norfolk and Western Railroad Company, is not, either by its charter or in actual fact, confined to the States of Virginia and West Virginia, under whose laws it exists as a corporation. It not only carries freight and passengers to the ends of its own lines, but, being enabled by its agreements and running arrangements with other companies, it contracts to carry, and does carry, freight and passengers in its own cars, from points upon its own line to points in Pennsylvania and New York, and the New England States, and from points in those States to points in the Southern States. It sells through tickets to points in other States, and actually transports passengers to those dis-

tant points. It issues through freight receipts to points in other States, and actually transports the freight in its own cars to those points.

In the third clause of the deposition of Mr. Macdowell, (Record, p. 14,) it is particularly set forth:

"That resulting from the junctions with the transportation lines herein described, and the contracts herein referred to, close connections with trains and with steamships have been established, for the purpose of creating and maintaining through transportation routes for passengers and freight, whereby passengers may be ticketed at points and in States distant from the termini of the Norfolk and Western Railroad Company, and be transported on through tickets, over its line to other points in other States, likewise distant from its termini, and that similarly through freight receipts may be given, and the freight properly and promptly transported between distant points, traversing *en route* the whole or part of the Norfolk and Western Railroad.

"That the through lines or routes of travel and transportation thus established are well known to the public, and their popularity is maintained by an efficient through service of cars and trains, and by wide-spread advertisements; and that to further maintain their popularity, specific and attractive names have been adopted, such as "Kennesaw Route," "Shenandoah Route," "Virginia, Tennessee and Georgia Air Line," "Great Southern Despatch," &c., by all of which means it is intended to keep them before the public, particularly as routes for through transportation.

* * * * * * * * *

"That certain arrangements have been made, and are in force, for running many through passenger, baggage, and express cars, including particularly, through Pullman sleeping cars, in connection with through passenger routes, which cars, for the convenience of the traveling public, traverse two or more of the lines of railway composing the through passenger route.

* * * * * * * * *

"That in order to accommodate the through freight offered for transportation, new cars have been built and complete arrangements have been perfected, whereby the cars of one railroad company, forming a link of the through route, are forwarded over two or more lines of railroad through several States to destination, so as to facilitate through freight transportation by avoiding transfer from car to car *en route*.

And he further says, in the same clause, that the company has, by contract, obtained "close and valuable connections

with and privileges to enjoy the facilities of railroads entering the cities of Washington, Baltimore, Philadelphia, and New York."

In the fourth clause of his statement (Record, p. 16) he says:

"That large quantities of freight and large numbers of passengers were, during the period covered by this suit, and still continue to be, transported over the through routes described between points in several States distant from the line of the Norfolk and Western Railroad in both directions, and also between such distant points and local points on the line of the Norfolk and Western Railroad. That the tonnage of the Norfolk and Western Railroad Company has from the time of organization consisted largely of cotton brought from the southwestern States, via Bristol, to different points in the eastern States, and that there is also a large tonnage of coal shipped over its line from the Flat Top coal region in West Virginia and Virginia, to Norfolk, and shipped thence to the New England States and other points in the United States and elsewhere. That there is along the line of the Norfolk and Western Railroad a large production of iron ore and of pig iron, and also of lumber, tobacco, and cattle, shipped chiefly to Pennsylvania and New York."

It is not claimed that the simple act of making contracts with other roads brought this corporation under the protection of the commercial clause of the Constitution of the United States, but the fact that by making those contracts it obtained facilities upon railroads extending into other States, whereby it was permitted to become, and has become, a transporter of freight from State to State, does bring it within such protection, because the business thus transacted is clearly inter-State commerce.

Mr. Macdowell, in the fifth clause of his deposition, states what is a matter of such common knowledge that a Court might well take judicial notice of it without testimony. He says, (Record, p. 16:)

"That as a result of the general growth of the country and the close business and commercial relations between the different parts of the United States, and the extent and character which the transportation business has assumed, and to meet the de-

mands of the public, it is, and has been for years, absolutely necessary for railroad companies, regardless of State lines and the termini of railroads of particular companies, to establish and maintain through routes for the transportation of freight and passengers, and in order to properly maintain their relations with connecting lines and conduct their general commercial and financial operations, it has become necessary to establish main or branch offices at or near the railroad and financial center of their respective sections of the country."

In the same clause he shows that as the principal shippers of a large portion of through freight reside, or have offices, in Philadelphia, and the other companies whose roads forming part of the through line have also their offices there, it is necessary that this company shall there maintain an office; and in the sixth clause (Record, p. 17) he gives further abundant reasons why it is necessary to have an office there, and concludes as follows:

"The Norfolk and Western Railroad Company could not, at any time in the year 1883, or since, have dispensed with its office in Philadelphia, or removed the office to New York city without seriously disturbing its own business conveniences, and those of connecting lines and main shippers over its route, and *unless it were to maintain its office in the city of Philadelphia for the purpose aforesaid, the company would be deprived of the ordinary and usual commercial conveniences and facilities now enjoyed in Philadelphia, and required for the transaction of its business of transporting inter-State freight and passengers.*"

This is virtually one of the agreed facts in the case, the affidavit of Mr. Macdowell which, in the trial court was marked "Exhibit D., H. C. D," (Record, p. 46,) having been received without objection by the Commonwealth. Her counsel did, indeed, reserve the right to object to the relevancy of any part of it, but the right was never exercised. Neither admission, agreement, nor proof would be necessary, however, to establish so obvious a proposition, of which any court must take notice, that no business of any magnitude can be carried on in the State without an office of some kind. The requirements of modern travel and transportation require through lines made up of the connecting roads of dif-

ferent companies in different States. The business conducted by these through lines is largely inter-State transportation. Competition, which is the life of business, requires railroad companies to maintain, frequently at points distant from their own roads, offices for the sale of tickets, for the solicitation of freight business for their lines, for the making out of freight bills, the collection of moneys for freight, and the accommodation of travelers and shippers by their lines. The Pennsylvania Railroad Company does not own a mile of railroad outside of the State of Pennsylvania, and yet, by reason of its leases and agreements and traffic contracts, it is enabled to do a business whose ramifications extend throughout almost the entire country. It has offices in nearly if not all of the States of the Union, and its extensive inter-State business requires that it should have such offices.

Said Mr. Justice Strong, in delivering the opinion in the case of the *State Freight Tax, supra, (15 Wallace, 275:)*

"Probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. *A power to prevent embarrasing restrictions by any State was the thing desired.*"

What restrictions could be more embarrassing than those found in the Pennsylvania statutes of 1874 and 1879, the former making it a misdemeanor for the agents of this company to carry on any business in Pennsylvania without the establishment of an office, and the latter requiring it to pay $6,250 per annum for the privilege of having such office.

In *Almy* v. *The State of California, 24 Howard, 169*, it was held that a State law imposing a tax upon bills of lading upon certain classes of freight transported from that State to any part or place without the State was an embarrassing restriction upon commerce, and, therefore, unconstitutional. Chief Justice Taney pointing out that while differing in form from a tax upon the article exported, a tax upon the

bill of lading was, in substance, the same thing, as "the necessities of commerce require it," or some equivalent instrument of writing. The Pennsylvania statute prohibits this company from maintaining, except upon onerous conditions, an office in which bills of lading may be made out, or tickets sold, or freight bills received, or business solicited—an office which the necessities of inter-State commerce require.

In *Foster* v. *Davenport*, *22 Howard*, *244*, it was held that a boat engaged in lightering goods to and from the wharves of the city of Mobile, and larger vessels engaged in foreign and inter-State commerce, whose size and the shallowness of the water prevented them from loading and re-loading at the wharves, could not be distinguished from that in which the vessels it towed or unloaded were engaged, and that, therefore, no license could be required of it. By the same reasoning, the business conducted in the office of the Norfolk and Western Railroad Company at Philadelphia cannot be distinguished from that of the inter-State transportation which requires the maintenance of the office.

Mr. Justice Field, in *Gloucester Ferry Co.* v. *Pennsylvania*, *114 U. S.*, *196*, declared that the power to regulate commerce was exclusive in Congress, and on page 204 declared that that power "embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged." It was there held that the maintenance by a New Jersey ferry company, of a slip or dock at Philadelphia, upon which it received or landed passengers carried or to be carried from or to New Jersey did not render the company subject to taxation in Pennsylvania.

Welton v. *State of Missouri*, *91 U. S.*, *275*; *Moran* v. *New Orleans*, *112 U. S.*, *69*; and *Walling* v. *Michigan*, *116 U. S.*, *446*, are all cases in which the States were declared powerless to require license fees where the business involved was inter-State or foreign commerce.

The point made by the learned judge of the trial court

and adopted by the Supreme Court of Pennsylvania, that the States are not deprived of their rights to exclude foreign corporations when the inter-State commerce which they transact is effected by means of private contracts to which the State is not a party, seems to be in direct conflict with the decision of this court in *Pickard* v. *Pullman's Southern Car Co., 117 U. S., 34*, in which case a Tennessee statute requiring a privilege tax of $50 per car for all sleeping cars of coaches used or run over railroads in Tennessee, and not owned by the railroad on which they were run or used, was declared void. The defendant in that case was a corporation of the State of Kentucky. It owned no railroad in Tennessee, and had received no authority from that State, but its cars were running in, into, through, and out of it under contracts with railroad companies by the terms of which the railroad company received the usual fare for transportation and the Pullman Company received compensation for sleeping accommodations in the cars. The business of the latter was held to be inter-State commerce, and, although it was conducted in Tennessee strictly under private contracts, to which the State was not a party, it was held to be beyond her regulating power.

In *Fargo* v. *Michigan, 121 U. S., 230*, it was declared unconstitutional for the State of Michigan to impose a tax upon the gross receipts of the Merchant's Despatch Transportation Company, a corporation of the State of New York, which owned no railroad whatever, but was engaged in soliciting and contracting for the transportation of freight requiring to be carried over connecting lines of railroad, into, out of, and through that State. It was enabled to conduct its inter-State business only by means of private contracts with the several companies owning the railroads, to which contracts the State was not a party. Nevertheless its inter-State business was declared beyond the power of State regulation or control.

The case in hand may be briefly summed up thus: The

Norfolk and Western Railroad Company is largely engaged in the transportation of freight and passengers into, out of, and through the State of Pennsylvania, and in making in said State, extensive purchases of material and supplies for shipment into other States. Not only do the necessities of that business require the maintenance by the company of one or more offices in Pennsylvania, but the Pennsylvania statute of 1874 makes it a misdemeanor punishable by fine and imprisonment for any person to act as the agent of the company in that State, except upon condition that it shall maintain an office. The sixteenth section of the act of 1879 requires the company to pay an excessive and burdensome tax for maintaining that office. It therefore imposes restrictions, if not upon the inter-State commerce itself, at all events upon an instrumentality which was intended to, and does, aid and encourage inter-State commerce, and is, therefore, void, because in conflict with clause 3 of section 8 of Article I of the Constitution of the United States, which reserves to Congress the right to regulate commerce among the several States.

Conscious of the unwisdom, if not the unconstitutionality, of this law, the Legislature, by act approved April 24, 1885, (Laws of Pennsylvania, page 9,) repealed it, reserving to the Commonwealth the right to collect license fees which had accrued prior to that date. The only claims covered by the reservation are believed to be those against this company and the Shenandoah Valley R. R. Co. The revenues of the Commonwealth will therefore, fortunately, be but slightly affected by the reversal of judgment in this case.

M. E. OLMSTED,
Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 294.

THE NORFOLK AND WESTERN RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

Supplemental Brief on Behalf of Plaintiff in Error in Reply to the Argument Submitted on Behalf of the Commonwealth of Pennsylvania.

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JUDD & DETWEILER, PRINTERS.

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The scheme of corporate taxation, as found in the Pennsylvania statute of 1879, is indeed an extensive one.

In imitation of an ancient edict of some celebrity it practically declared that all the world shall be taxed. It applies not only to Pennsylvania corporations, but as well to those of every other State or Territory of the United States—to those incorporated by the United States, and to those in-

corporated under the laws of any foreign state, country, or government and in any way having capital invested in Pennsylvania or transacting any business therein.

The 4th section of the act taxes all those "doing business in this Commonwealth" in their own names "or having capital employed in this Commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner." The tax imposed by this section is construed by the courts of Pennsylvania to be a tax upon the *property* of the corporation and applicable to foreign corporations only to the extent that their property is brought within the limits of the State. Such transactions of business as do not require the permanent investment and use of capital in property within the State are therefore not held to be "doing business" within the meaning of this 4th section. (*Com.* vs. *Standard Oil Co.*, 101 Penna., 119.)

The 16th section is intended to bring within the net those foreign corporations having transactions within the State, but of such character as not to involve the permanent investment of capital in taxable property therein.

It prohibits them from having any office or offices except upon payment of the license fee, determined by the amount of capital stock they are authorized to have. The corporations which are subject to the property tax imposed by the 4th section are exempted from the operation of the 16th section by the proviso thereto.

The Pennsylvania courts having declared the Norfolk and Western Railroad Company subject to the 16th section, the learned counsel for the Commonwealth insist that this is equivalent to saying that it is not subject to the 4th section, and is practically a declaration that it is not doing business in the State within the ruling in the Standard Oil case. If it is not doing business, they argue, it cannot be engaged in commerce. It is respectfully submitted in reply that the question here involved is not whether the company is doing business in Pennsylvania within the meaning and

intendment of the 4th section of the act of 1879, but whether or not it is engaged in commerce among the States within the meaning of clause 3 of section 8 of article 1 of the Constitution of the United States.

But the court did not find as a fact that the company was not doing business in Pennsylvania. On the contrary, it expressly declared that "as part of the business thereof, freight and passengers are carried into and out of this Commonwealth." It also found as a fact that "it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of this road." (See Transcript, pages 38, 39.)

Mr. Justice Field, speaking for this Court, in *Mobile Co.* vs. *Kimball*, 102 U. S., 691, said:

"Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system."

Within the above definition the finding of facts by the trial court shows this company to be engaged in interstate commerce in two ways: First, in the transportation of freight and passengers into, out of, and through Pennsylvania, and, second, in the purchase in Pennsylvania of materials and supplies for use upon its road in Virginia and West Virginia. These facts are broad enough; but we are not limited to them. This case was tried under the act of 1874, without a jury. A case between the Commonwealth and the Lackawanna Iron and Coal Company was heard in the same trial court under the same act of 1874, the court finding both the facts and the law. Being dissatisfied with the judgment, the Commonwealth appealed. Mr. Justice Ster-

rett, who delivered the opinion of the supreme court of Pennsylvania, in the course thereof said:

"This case was tried by the court without a jury, under the act of 1874. The findings of the learned judge are not as full and specific as they should have been or as the facts would have warranted, but in connection with other facts about which there is no dispute we have sufficient data to enable us to dispose of the main question. Indeed, there was no conflict of testimony in the main. The oral evidence was that of Charles F. Mattes, called by the company. Among other things, it was clearly shown that a considerable portion of coal mined by the company during the two years, about 450,000 tons, alleged to be too small for its own use, was sold by the mining company for not less than $721,000."

Based upon this fact, which appeared in evidence but was not mentioned in the finding of facts by the trial judge, the supreme court reversed the trial court and added several thousand dollars to the amount of the tax found due by the company (see *Appeal of the Commonwealth*, 24 Weekly Notes of Cases, 191, 192). The case has not yet appeared in the State reports. The opinion was filed June 28, 1889.

In *Commonwealth* vs. *Mahoning Rolling Mill Co.*, 24 Weekly Notes of Cases, 194, the same learned judge again found in the undisputed evidence certain facts not formally found by the trial judge, and made such use of them as to require the reversal of the judgment entered by the trial court and an increase in the amount of tax found due from the company.

In the present case there was not, either in the trial court or in the supreme court of Pennsylvania, any dispute as to the facts. The affidavit of William G. MacDowell and the exhibits attached thereto (Transcript, pp. 11 *et seq.*) were submitted to the attorney general of Pennsylvania in advance of the trial, and it was understood the case was to be tried upon the facts therein set forth, the Commonwealth reserving only the right to object to the relevancy of any part of the affidavit, which right of objection was not exercised

(Transcript, p. 46). This affidavit, which was presented to the trial court January 6, 1886, was by the trial judge filed with the defendant's points and stenographer's notes, and with the opinion and finding of the court, February 1, 1886, and thereby became part of the record (Transcript, p. 4; and see the endorsement, Transcript, p. 37). This evidence was wholly undisputed; there was no other in the case. Referring to this affidavit, it appears that the supplies purchased by the company in Pennsylvania were very extensive, averaging nearly one million of dollars per annum. (Transcript, p. 17.)

This case is not comparable to that of *Cooper M'f'g Co.* vs. *Ferguson*, 113 U. S., 727, where there had been but a single transaction, namely, the making in Colorado of a single contract to make in Ohio a steam-engine, &c., and place it upon the cars in Ohio for shipment to Colorado. Here there has been and is a continuous purchasing of supplies and materials, amounting annually to very large sums—transactions of such magnitude that they cannot well be effected without some agency or office in Pennsylvania, and of such continuing character as to bring them within the scope of the Pennsylvania statute of April 22, 1874 (p. 108), making it a misdemeanor punishable by fine and imprisonment for any person to act as agent or officer of the company unless it shall file in the office of the secretary of the Commonwealth a statement showing the establishment of an office in the State and the appointment of its agent or agents therein.

Not only is an office required in Pennsylvania for the purchase of material, but Mr. MacDowell's affidavit conclusively shows that the necessities of the company's interstate transportation absolutely require it. He distinctly says that "unless it were to maintain its office in the city of Philadelphia for the purposes aforesaid, the company would be deprived of the ordinary and usual commercial facilities now enjoyed in Philadelphia and required for the transaction of

its business of transporting interstate freight and passengers." (Transcript, p. 18.)

He further says in the 7th clause that the office in Philadelphia was maintained "for the reason and purposes aforesaid," namely, for the purchase of materials and supplies and for the necessities of its interstate transportation business.

The learned counsel for the Commonwealth in their brief point to certain clauses of the traffic agreement locating the office of the general manager of the Great Southern Dispatch line within a certain territory which, they say, does not embrace Philadelphia, and argue from that that the business done under the contracts is done independently of the office of the Norfolk and Western Company in Pennsylvania. They omit reference to clause 13 (Transcript, p. 28), making it "the duty of each initial road, member of the line, to solicit and procure traffic for the Great Southern Dispatch at its own proper cost and expense;" also clause 12 of Exhibit "A" (Transcript, p. 21), providing for an organization for advertising, soliciting, receiving, billing, and forwarding freights at eastern and southwestern cities for the settlement of claims and expenses of the East Tennessee, Virginia and Georgia Air Line and authorizing the general manager to "employ such agents and clerks and to establish such offices and to employ such means as he may deem proper for securing travel over the East Tennessee, Virginia and Georgia Air Line."

This Court held in *Welton* vs. *Missouri*, 91 U. S., 275, Mr. Justice Field delivering the opinion, that the State of Missouri could not impose a license tax upon persons dealing in goods, wares, and merchandise not the growth, produce, or manufacture of the State, by going from place to place to sell the same. Such license tax was held to be a regulation of interstate and foreign commerce.

In *Robbins* vs. *Taxing District of Shelby Co.*, 120 U. S., 489 it was held, Mr. Justice Bradley delivering the opinion, that a Tennessee statute applicable alike to all persons engaged

in the business of selling by sample was unconstitutional as applied to those engaged in selling goods to be brought into the State from other States. Mr. Chief Justice Waite, with whom concurred Justices Field and Gray, dissented upon the ground that as the statute applied to all dealers alike, whether resident or non-resident, or whether dealers in domestic or foreign goods, there was no discrimination against, and therefore no attempted regulation of, interstate or foreign commerce. But in the case of *Corson* vs. *Maryland*, decided at the same term, the Court unanimously agreed that the State cannot levy a license tax or impose any other restriction upon citizens or inhabitants of any other State for selling or seeking to sell their goods in such State.

The Pennsylvania statute under which the present license fee is claimed applies only to foreign corporations. It discriminates against them. If the sale by sample, in a certain State, of goods to be delivered from another State is commerce among the States, the purchase in a State of goods to be transported to another State is equally so, and upon that branch alone this case is within the ruling of those just cited, and also that of *Asher* vs. *Texas*, 128 U. S., 129, in which, Mr. Justice Bradley again delivering the opinion, this Court held that a law of Texas requiring drummers to obtain a license was unconstitutional and void as a regulation of interstate commerce when applied to citizens of other States soliciting trade in Texas; and, whatever may be said of the right of this company to purchase in Pennsylvania materials and supplies for its railroads in Virginia and West Virginia without being subject to interference, it cannot at this late day be pretended that transportation of freight and passengers from one State into another is not commerce of such a character as to be subject only to the control of Congress.

It would be a mere affectation of learning to attempt to cite the numerous cases in which this Court has so decided. The evidence shows that the cars of the Norfolk and Western Railroad Company are daily passing into, through, and

out of the State of Pennsylvania; that the company contracts to transport and does transport freight and passengers into, through, and out of said State, and that the exigencies of this business require it to maintain an office there for the use of its officers, agents, and employés. The power of the State of Pennsylvania to prohibit the maintenance of this office for the purposes specified or to impose upon the company the onerous and burdensome license fee here attempted is denied and the protection of the Federal Constitution confidently invoked.

W. H. Clement,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

No. 294, October Term, 1889.

Norfolk and Western Railroad Company,

Plaintiff in Error,

vs.

Commonwealth of Pennsylvania.

Reply to Commonwealth's Supplemental Brief.

M. S. OLMSTED,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 1004. October Term, 1898.

NORFOLK & WESTERN R. R. COMPANY, *Plaintiff in Error,*

vs.

COMMONWEALTH OF PENNSYLVANIA.

REPLY TO THE COMMONWEALTH'S SUPPLEMENTAL BRIEF.

This case was decided in the State courts upon the broad principle that corporations of other States cannot lawfully extend their franchises operations into Pennsylvania without her authority, and that the way therefore in which the obligations or duties were their very such conditions as she may deem proper. It was conceded in such cases that the company was engaged in the business of interstate commerce, and that for the purpose thereof the office in Philadelphia was necessary. But the courts held that as the transportation conducted by it was effected by means of contracts with other companies owning the railroads in Pennsylvania, and the Commonwealth had never given any express authority to the company to be more or else business, it was not lawfully authorized, and might be prohibited. Said McPherson, J. U. J., the learned trial Judge, (Transcript, 61.)

"We will not decide that the inherent right of a State to exclude foreign corporations or to prescribe the terms upon which they may be admitted can be taken away by a private contract to which it is not a party. For the purposes of this case we assume that the license fee before us would be a regulation of commerce if sought to be imposed upon a corporation lawfully engaged in the business of inter-State transportation. Whether in every case an office license fee would be such a regulation, we do not decide."*

The learned Justice of the Supreme Court says: (Transcript, 51.)

"In the sense that the carriage of freight and passengers over such through routes from one State to another is inter-State commerce, the proportion which this company contributes to such carriage may be regarded as a portion of such commerce. But that is not the sense in which, as we understand it, the commercial clause of the Federal Constitution is to be interpreted when its immunity is invoked by a particular corporation or person engaged in the transportation business. We understand that its protection is extended only to such transportation as is completely and lawfully authorized to be conducted from one State to another."

In brief, these courts hold that when Pennsylvania has conferred authority upon corporations to do business within her borders, then, and thereafter, their business if it be inter-State transportation, is subject to the protection of the Federal Constitution, but that in the absence of such authority from the State, the commercial clause is inoperative, and the States may, if they choose, totally prohibit such inter-State transactions. This direct issue upon which the Commonwealth gained the judgment in her own courts, and which is the only one involved in this case she is now striving to evade. The effort is made to have it appear that the Norfolk and Western Railroad Company is not engaged in business in Pennsylvania, or that if it is, there is no relation between its business and its office. But this effort must be fruitless. The 4th and 7th sections of the act of 1879 are not here involved.

* This case is reported in 114 Penna. 304.

As shown in the supplemental brief heretofore filed, the statute was decided in Com. v. Standard Oil Co., 201 Pa. 148, to impose a property tax and to apply to foreign corporations only to the extent to which they have capital permanently invested in property taxable in Pennsylvania. The 7th section, probably, does not in its terms include the Norfolk and Western Railroad Company, which does not own, and can hardly be said to lease from any other corporation, any railroad or other device for transportation in Pennsylvania. In any event, its receipts are not subject to taxation under the said section, so far as Pennsylvania is concerned, they are derived from the transportation of freight and passengers into, out of, or through the State. *Pittsburgh and Southern Coal Steamship Co. v. Pennsylvania*, 192 U. S. 358.

The fact, therefore, that the Commonwealth is now claiming a tax from the company under either the fourth or the seventh sections in no way affects the determination of the question of its right to impose the license tax claimed under the 10th section. The said judge formally declared the company to be engaged in the transportation of freight and passengers into and out of Pennsylvania. Also, that during the period for which the license is imposed, "it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road." Its business of inter-State transportation carried on under its contracts with other companies is such that it is liable in Pennsylvania for injury or damages to freight or passengers carried to be sold in that State upon its through routes of transportation. *Hall-wood (Jones) v. Pratt*, 89 Wall. 707; *Railway Co. v. Mississippi*, 97 U. S. 402. Its business of this character in Pennsylvania is very extensive. So, also, are its purchases of materials and supplies for its roads in Virginia and West Virginia. In both branches it is of such a permanent and continuing character as to bring the company clearly within the scope of section 3 of Article XVI of the Constitution of Pennsylvania, and the Statute of April 22, 1874, (Laws of Pennsyl-

vania, 108.) The latter, which was passed to carry into effect the former, forbids the corporation to do any business in the Commonwealth, until it shall have established an office and appointed an agent therein, and makes it a misdemeanor, punishable by fine and imprisonment, for any person to act as the agent, officer, or employee, of any foreign corporation, which shall not have obtained from the Secretary of the Commonwealth a certificate under the seal of the Commonwealth showing its compliance with the said act. With those provisions the company has complied.

The sixteenth section of the act of 1879 cannot be entirely disassociated from this act of 1874. The only business in which the company is engaged in Pennsylvania is inter-State commerce. As the act of 1874 makes it imperative upon the company to maintain an office for the transaction of that business, it is hardly incumbent upon the company in a proceeding to recover a license fee under the act of 1879 to show the relation of the office to the business. The Commonwealth having thus required the maintenance of the office as one of the conditions of the company's inter-State business in Pennsylvania, it could hardly affect the decision of this case if it were made to appear that in that office there were some transactions of an independent character not connected with the said business. But as a matter of fact nothing of the kind appears. It is shown that the main office of the company is at Roanoke, Virginia. Its business, of a strictly corporate character, is there conducted in that office. There is not, in this case, except in the argument of the Commonwealth's counsel, anywhere to be found any evidence of, or reference to, any act of this corporation or of any of its officers, agents, or employees not strictly connected with its inter-State operations. It does not appear that the company has ever attempted, or asked, or expected to exercise any corporate function whatever in Pennsylvania.

Independently of the requirements of the act of 1874, the necessities of the company's inter-State business required the

maintenance of the office in Philadelphia. The purpose for which it was, and is maintained fully appear in the statement of Mr. McDowell, and the exhibits which form part thereof, which constitute the agreed facts upon which this case was tried. In Exhibit C (Transcript, 20) there is found an agreement between the Pennsylvania Railroad Company and numerous lines under its control, the Norfolk and Western Railroad Company, Shenandoah Valley Railroad Company, East Tennessee, Virginia, and Georgia Railroad Company, Cumberland Valley Railroad Company, and Western Maryland Railroad Company, the object of which is thus declared at the very outset:

"Whereas, It is desired by the several companies parties hereto to establish a fast freight line for the purpose of transporting such freights between Boston, New York, Philadelphia, Baltimore, interior points in Pennsylvania, Maryland, New York, and the New England States, and points south accessible by means of the Shenandoah Valley Railroad and its southern connections as may be for the mutual interest of the parties to this agreement to transport by said fast line, via Hagerstown, the understanding being that the agreement is not intended to apply to the transportation of live stock, coal, pig iron, and similar freight.

"Now, therefore, this agreement witnesseth:

"First. The line shall be known and designated as 'The Great Southern Despatch.'"

The manner in which the line is to be operated is fully set forth, and while provision is made for a general manager who is to have a certain supervision of the whole business, it is nevertheless, in the thirteenth clause, provided that: "It shall be the duty of each initial road, member of the line to solicit and procure traffic for The Great Southern Despatch at its own proper cost and expense."

Exhibit A (Transcript, 19) shows the contract under which a very extensive route for through passenger transportation was provided for and continues to be in operation. Numerous other contracts with other roads are referred to in Mr. McDowell's statement, although not attached as ex-

hibits. The agreement establishing the line known as "The Great Southern Dispatch" does not "apply to the transportation of live stock, ores, coal, pig-iron, and similar freight." It appears (Transcript, 16) "that there is along the line of the Norfolk and Western Railroad a large production of iron ore, and of pig-iron, and also lumber, tobacco, and cattle, shipped chiefly to Pennsylvania and New York." It will be remembered that the Norfolk and Western Railroad Company connects at Roanoke with the Shenandoah Valley Railroad, which in turn connects at Hagerstown, Maryland, with the Cumberland Valley branch of the Pennsylvania Railroad Company's system. It appears (Transcript, 16) "that the Shenandoah Valley Railroad Company, with which the Norfolk and Western Railroad Company has, by contracts relating to the interchange of business, and otherwise, close business relations, has, under its contracts with the Pennsylvania and other railroad companies, close and valuable connections with, and privileges to enjoy the facilities of, railroads entering the cities of Washington, Baltimore, Philadelphia, and New York." Under some of these contracts, which are not set forth in full, the Norfolk and Western transports the commodities above mentioned from Pennsylvania and New York.

The principal producers of iron and the sole miners of coal on the line of the Norfolk and Western railroad, during the period covered by this suit, had their offices in Philadelphia. [illegible] that the transportation of coal and iron from Pennsylvania, by this line, had the effect to materially reduce the prices of both commodities in that State. As the purchasers of the coal and iron had their offices in Philadelphia, the contracts for its shipment and the agreements thereto were naturally made at the Philadelphia office. In short, [illegible] all his statements (Transcript, 16) Mr. Ballard says that resulting from the junctions with transportation lines, both rail and water, and the contracts referred to, it became necessary to make arrangements." Whereby passengers may be

of law involved were to be determined upon the basis of the facts set forth in Mr. McDowell's statement and the exhibits which form part thereof. In cases tried under the act of 1874, where there is no dispute as to the facts, the Appellate Court will consider the proofs and if necessary make use of such additional facts as are not mentioned in the formal finding by the trial Judge: *Appeal of the Commonwealth*, 91, *Weekly Notes of Cases*, 191; *Commonwealth vs. Mahoning Valley Mill Co.*, 6 Kulp, 534. (See these cases referred to on pages 3 and 4 of supplemental brief heretofore filed on behalf of plaintiff in error.) In this case the statement of Mr. McDowell and the exhibits which form part thereof, form part of the record. They were presented to the trial Judge January 6, 1886, (Transcript, 45–46,) and by him placed on file with his opinion, February 1, 1886, (Transcript, 4.) And see his endorsement, (Transcript, 37.)

The Norfolk and Western Railroad Company does not own any real estate in Pennsylvania, nor does it seek to. It does not exercise in Pennsylvania any corporate or other franchise or privilege not immediately connected with inter-State commerce and required for the purposes thereof. Its office in Philadelphia is maintained and required not only because of the requirements of the act of 1874, but as well because of the necessities of the inter-State business of the company. The only issue involved, therefore, is the one, and the only one which the courts of the Commonwealth were able to find in the case, and the one upon which they squarely decided it. The question to be determined is, can the State of Pennsylvania say to a foreign corporation, "You shall not, in any manner, extend your operations of inter-State commerce herein unless you establish an office here, and you shall not have that office unless you pay for it $6,250 per annum?" In other words, can the State of Pennsylvania prohibit foreign corporations from engaging within her borders in business which is strictly inter-State commerce?

It may be admitted, as claimed on behalf of the Commonwealth, that at the time of the adoption of the Constitution, it was the common law doctrine, well understood, that only by special weight the corporations of one independent sovereign State obtained business in another independent sovereign State. But when the common law and the Constitution are found to be in conflict, which must give way? If the States have conferred upon Congress power incompatible with any of the powers of a monopoly theretofore exercised by them, the latter no longer exist. The power conferred by the States upon Congress to regulate commerce among the several States is not limited by that exercised on the several systems. If it were, the provision would be of little value. As pointed out by Mr. Justice Field, in *Paul* v. *Virginia*, 8 Wallace, 168, a large part of the commerce of the world was conducted by corporations even at the time of the adoption of the Constitution, while at this day nearly all commercial transactions, particularly those extending into more than one State, are conducted by corporate enterprise. If the States have conferred upon Congress the power to regulate the inter-State commercial operations of corporations, equally as those of individuals, it would follow that the power of the States to regulate that commerce, or to prohibit the corporations from engaging in it, is taken away. This limitation upon the power of a State to exclude foreign corporations extends, of course, no further than is necessary to give full force and effect to the Constitutional provision, and does not, therefore, extend to corporations not engaged in interstate or foreign commerce, nor even to those of an exceptional character as may be necessary for the protection of that commerce. There existed in the States, at the adoption of the Constitution, a general power to impose taxes for their support. But after the adoption of the Constitution that power, although not surrendered, was to be exercised subject to Constitutional limitations. Thus in Walter v. *Missouri*, 1 Otto, 275, Mr. Justice Field, delivering

the opinion of the Court, said: "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution," and because the exercise of the power to tax in that case was found to be in conflict with the commercial clause, it was declared not to exist. The framers of the Constitution evidently believed that, so far from being injurious to a State, commerce with foreign nations and with other States was to be encouraged. The power to impose taxes is one without which no government could exist. The power of a State to impose taxation is certainly as important and valuable as its power to exclude foreign corporations engaged in inter-State commerce. If, then, the very highest and most important prerogative of sovereignty in a State must give way to the commercial clause, why shall not the lesser power to exclude foreign corporations? Said Mr. Justice Field, in the case last cited, (p. 279:) "The power to regulate conferred by that clause upon Congress was one without limitation." It, therefore, rises superior to all inconsistent rights which previously existed in the States.

In the same case the same learned jurist declared that no affirmative action by Congress is necessary. He said (p. 282) "the fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce, does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammelled."

This language is quoted and a score of cases supporting its doctrine are cited in *Brown v. Houston, 114 U.S., 622-631*, by Mr. Justice Bradley, who adds: "Any regulation of the subject by the States is repugnant to such freedom." In the face of this declaration the Commonwealth of Pennsylvania claims that in 1879 she had the right to entirely pro-

fields that commerce which Congress by his inaction had declared should remain free and untrammelled.

This case is completely covered and absolutely ruled by *Leloup vs. Port of Mobile*, 127 U. S., 640. True, there was in that case an act of Congress relating to telegraph companies, but if the inaction of Congress is equivalent to an affirmative declaration that commerce shall remain free and untrammelled, as this court has frequently held, the fact that an act had been passed in that case did not create or establish any different principle. In point of fact the case was not rested upon the act of Congress, but the court, by Mr. Justice Bradley, declares that, after a re-examination of the whole subject, and a consideration of all the previous cases involving the commercial power of Congress, the fullest and most just construction of the Constitution in all its parts "leads to the conclusion that no State has the right to lay a tax upon inter-State commerce in any form, whether by way of duties laid upon the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Hinze Insurance Company v. Mows*, 99 Wallace, 455, and *Barron v. Burnside*, 121 U. S. 186, this court has ruled that even as to foreign corporations not engaged in inter-State commerce the States cannot impose conditions repugnant to any provision of the Federal Constitution.

In the dissenting opinion in "*State Tax on Railway Gross Receipts*," 15 Wallace, 284, Mr. Justice Miller, with whom Justices Field and Hunt concurred, said: (p. 296.)

"If the State of Pennsylvania avail herself of her central position across the great lines of necessary commercial intercourse between the east and the west, and of the fact that all the ways of land and water carriage must go through her territory, is determined to support her government and pay off her debt by a tax on this commerce, it is of small moment that we

say she cannot tax the goods so transported, but may tax every dollar paid for such transportation. Her tax by the ton being declared void, she has only to effect her purpose by increasing correspondingly her tax on gross receipts. In either event the tax is one for the privilege of transportation within her borders; in either case the tax is one on transportation."

And again, (p. 299:)

"I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our constitution I have no doubt; and I have just as little doubt that the whole recognition of this principle is essential to the harmonious future of this country now as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The inter-State commerce to day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation."

Although when written, this was a dissenting opinion, it was afterwards practically adopted by the entire court, and in the opinion of the same learned justice, in *Fargo* v. *Michigan*, *121 U. S.*, 230, the same language substantially is used, and the broad proposition therein laid down, adopted as the unanimous opinion of the court. That was the case of a foreign corporation having no railroad, but doing business in Michigan upon the lines of other companies under contracts much as the Norfolk and Western Railroad Company is doing business in Pennsylvania. There is no distinction in principle between the two cases, nor is there any to be pointed out between this pending case and *Pickard* v. *Pullman's Southern Car Co.*, *117 U. S.*, 34, where the State of Ten-

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Paye v. *Michigan*, *121 U. S.*, 930; *Philadelphia and Southern Mail Steamship Company* v. *Pennsylvania*, *122 U. S.*, 326. It is clearly within the provisions of section 18. If the Norfolk and Western R. R. Co. may constitutionally be required to pay a license fee, so, also, may the Gloucester Ferry Company, but in order to so hold, this court must squarely reverse its former decisions not only in the Gloucester Ferry case, but in numerous others cited herein and in the other briefs filed.

It may be safely conceded that whatever property is brought into Pennsylvania by the Norfolk and Western Railroad Company may be taxed the same as other similar property in the State; that it is subject to proper police regulations by the State. Possibly the act of 1874, standing by itself, may be sustained as a proper exercise of the police power. At all events, this company is perfectly willing to maintain an office and specify an agent therein upon whom process may be served. But the 16th section of the act of 1879 is not a police regulation, and can be sustained only upon the theory that the Commonwealth has the right to prohibit entirely the business in which the company is engaged. If it may do this, it may prevent the vessels of foreign corporations from loading and unloading freight and passengers at Philadelphia, or from having an office in which tickets may be sold or freight bills made out or the accounts of the business kept. Such companies would not be taxable under either the fourth or the seventh section of the act, but would be clearly within the terms of the 16th section, and stand upon precisely the same footing as the Norfolk and Western Railroad Company.

In *Leloup* v. *Port of Mobile*, *supra*, Mr. Justice Bradley declares "That in order to give full and fair effect to the different clauses of the Constitution the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times."

In Gibbons v. Ogden, 9 Wheaton, 1-2, Mr. Chief Justice Marshall said:

"But, in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United States with foreign nations is, in the vast majority of cases, commerce which concerns more States than one. The constitution does not stop at the external boundary line of each State, but boldly advances to those of the United States. Congress has a right to regulate it to its utmost extent, acknowledging no limitations other than are prescribed in the Constitution.

"The power to regulate commerce among the several States is vested in Congress in the same words which confer the power to regulate it with foreign nations. In exercising this power, Congress is unrestricted except by those restraints which are found in the Constitution. Those restraints deny the power to States which may enable them to oppose the will of Congress, or to render nugatory the execution of any power granted to that body. But the power to regulate commerce, like every other power vested in Congress, may be exercised within the United States to any extent not forbidden by the Constitution. That instrument contains no restriction on this power, excepting one which has respect to the impost. The subject is entirely commercial, and admits of being exercised in any manner the wisdom of the legislature may direct. That body may prescribe the limits which shall separate the States, may provide when the commerce shall cease in the vessel which is employed, and the manner in which the intercourse shall be conducted. These are all questions which may be decided differently by the wisdom of different men, but the power itself is entire in each, and may be exercised at the discretion of the body in which the constitution has placed it, unless the exception to which we have alluded may be found in the nature of the subject. This exception must be admitted to exist, if the power of regulating commerce is co-extensive with the power of taxation, and if the latter reaches the subjects which are proposed to be taxed. But the power to regulate commerce is not necessarily connected with the power of taxation, and is frequently applied to objects to which the latter is entirely inadequate. Full power to regulate a subject implies the power to make all needful regulations respecting it, and to modify those regulations with all the discretion which may be deemed necessary by the government which holds the power. The power to regulate commerce among the several States is not confined to the purposes of improving the navigation of rivers, or establishing turnpike roads, or building bridges, or making canals. Congress may use any means it pleases which are not prohibited by the constitution, in the regulation of commerce with foreign nations, among the States, and with the Indian tribes. The power of Congress does not stop at the jurisdictional lines of the several States. The power to regulate commerce among the several States is vested in Congress to the same extent as the power to regulate commerce with foreign nations. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary line of each State, but may be introduced into the interior. It may be exercised by prohibiting certain articles from introduction into the United States, or any part of them, or it may be exercised by limiting the number of ships or vessels employed in the trade, or by licensing those employed in it. The power is plenary, and may be exercised to its utmost extent, acknowledging no limitations other than are prescribed in the Constitution."

As the constitution does not prescribe any limitation whereby the uniform power of Congress to regulate commerce by several persons, it must be held, as Mr. Chief Justice

has repeatedly and invariably held, that it does extend to that conducted by corporations. The license tax in question is imposed directly upon the business in which the Norfolk and Western Railroad Company is engaged. That business is strictly inter-State commerce. This case, therefore, is clearly within the reservation of Mr. Justice Field, who, in *Pembina Mining Co. v. Pennsylvania*, 125 U. S., 192, said,

"The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or having offices for that purpose, or to exact conditions for allowing the corporation to do business or have offices there arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, inter-State or foreign. The control of such commerce being in the federal government, is not to be restricted by State authority."

It is to be noted, moreover, that Congress has acted; that the very transportation in which the Norfolk and Western R. R. Co. is engaged is the subject of regulation by the inter-State commerce act, and is conducted under the supervision and control of the inter-State commerce commission.

If the States have the right to prohibit such commerce, they have the right to nullify the act of Congress and to render valueless and ineffective the commercial clause of the Federal Constitution. That they have no such power has been so often declared by this court as to render further discussion unnecessary.

M. R. OLMSTED,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States

No. 294, OCTOBER TERM, 1909.

NORFOLK & WESTERN RAILROAD COMPANY

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

Writ of Error to Supreme Court of Pennsylvania.

BRIEF ON BEHALF OF THE COMMONWEALTH.

JOHN P. SANDERSON,
Deputy Attorney General.

WILLIAM S. KIRKPATRICK,
Attorney General.

In the Supreme Court of the United States.

No. 294, OCTOBER TERM, 1889.

NORFOLK AND WESTERN RAILROAD COMPANY

vs.

THE COMMONWEALTH OF PENNSYLVANIA.

Writ of Error to Supreme Court of Pennsylvania.

BRIEF ON BEHALF OF THE COMMONWEALTH.

The State of Pennsylvania, by an extensive scheme of taxation, raises revenue for state purposes through the taxation of corporations, joint-stock companies limited partnerships and other subjects.

The general taxing statute in force at the time when the tax in suit was levied was that of June 13th, 1879 (P. L. 128). The fourth section of this act provides "that every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any state or territory of the United States or foreign government, and doing business in this commonwealth, or having capital employed in this commonwealth in the name of any other company or corporation or association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the commonwealth, annually, a tax to be computed as follows,

viz:" Then follow the provisions of the section imposing a tax upon capital stock of such corporations.

The sixteenth section of the same act is as follows:

"SECTION 16. That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this commonwealth, shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents or employés, unless it shall first have obtained from the Auditor General an annual license so to do, and for said license every such corporation shall pay into the state treasury, for the use of the commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the Auditor General shall not issue a license to any corporation until said license fee shall have been paid. The Auditor General and State Treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this state which does pay a tax under any previous section of this act."

The whole of the fourth section quoted from is printed in a foot-note* and the statute in full is printed as an appendix hereto.

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*SECTION 4. That every company or association whatever, now or hereafter incorporated by or under any law in this commonwealth, or now or hereafter incorporated by any other state or territory of the United States, or foreign government, and doing business in this commonwealth, or having capital employed in this commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall be subject to and pay into the treasury of the commonwealth annually a tax to be computed as follows, namely: If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill upon the capital stock for each one per centum of dividend so made or declared: If no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of the said capital stock made

By a comparison of the provisions of the fourth section with those of the sixteenth section, it will appear that the fourth section imposes a capital-stock tax upon such corporations as do business in Pennsylvania, whether domestic or foreign. This capital-stock tax is a property tax and is confined to such portions of the capital stock of the corporations, whether domestic or foreign, as are actually used or invested for purposes of corporate business in Pennsylvania. As construed, the tax includes all tangible property in Pennsylvania of the various corporations, whether domestic or foreign, having a situs in the state, and the intangible property of domestic corporations. The sixteenth section is intended to reach such corporations, and such only, as do not do business in Pennsylvania, but have an office or offices therein, for the use of their stockholders, officers, agents or employés.

Accordingly, it was adjudged by the court of common pleas

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in accordance with the provisions of the second section of this act, and in case any such company or association shall have more than one kind of capital stock, as for instance common and preferred stock, and upon one of said stocks a dividend or dividends amounting in six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amounted to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-half mill for each one per centum of dividends made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of three mills upon each dollar of a valuation, made also in accordance with the provisions of the second section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; and it shall be the duty of the treasurer or other officer having charge of any company or association upon which a tax is imposed by this section of this act to transmit the amount of said tax to the treasury of the commonwealth within fifteen days from the thirty-first day of December in each and every year: *Provided*, That whenever such corporation or company shall make any profit and add the same to its sinking fund without a division thereof amongst its stockholders, the amount of the profit thus added to its sinking fund shall be included in the report required by the second section of this act to be made, and for the purpose of this act the same shall be treated as having been divided amongst the stockholders, and shall subject the capital stock to taxation as a dividend: *Provided however*, That said money or any part thereof shall be expressly set apart for the payment of debts.

of Dauphin county, before which this case was tried in the first instance, that this company was subject to the office license tax. The case was tried without the intervention of a jury, under the act of 1874,* and the findings of fact (see transcript 38, 39) are as follows:

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*AN ACT *To provide for the submission of civil cases to the decision of the court and to dispense with trial by jury.*

SECTION 1. *Be it enacted, &c.*, That in any civil case now pending in any of the courts of this commonwealth, or hereafter to be commenced, after issue joined, the parties thereto, excepting those acting in a fiduciary capacity, may, by agreement filed in the proper office where such suit is pending, dispense with trial by jury, and submit the decision of such cases to the court having jurisdiction thereof; and such court shall hear and determine the same, and the judgment shall be subject to writ of error or of appeal as in other cases at law or in equity, at the option of either party.

SECTION 2. The decision of the court shall be in writing, stating separately and distinctly the facts found, the answers to any points submitted in writing by counsel and the conclusions of law, and shall be filed in the office of the prothonotary or clerk of the proper court where the case is pending, as early as practicable, not exceeding sixty days after such decision shall have been made from the termination of the trial, and notice thereof shall be forthwith given by the prothonotary or clerk to the parties or their attorneys, and if no exceptions thereto are filed in the proper office within thirty days after service of such notice judgment shall be entered thereon by the prothonotary or clerk; if exceptions to the findings of facts or conclusions of law be filed within said thirty days, the court or the judge thereof who tried the case in vacation, may, upon argument, order judgment to be entered according to the decision previously filed, or make such modifications thereof as in justice and right shall seem proper, subject always, nevertheless, to review by writ of error or appeal in the Supreme Court; such writ of error or appeal to be taken in the time and manner and with the effect prescribed by law.

SECTION 3. Every such case taken to the Supreme Court upon writ of error shall be heard and determined therein as writs of error are therein heard and determined; and every such case taken to the Supreme Court by appeal shall be heard and determined therein as cases of appeal in equity proceedings; and in case a new trial is ordered it shall be proceeded with before the same court in the same manner as hereinbefore provided for.

SECTION 4. An agreement to submit under this act shall be a waiver of the right of trial by jury.

SECTION 5. Cases submitted under the provisions of this act shall be subject to existing law as to costs, except no jury fee shall be required on entering judgment.

Approved the 22d day of April, A. D. 1874.

J. F. HARTRANFT.

"1. The defendant is a railroad corporation existing under the laws of the States of Virginia and West Virginia, and its main line and branches lie wholly within those states.

"2. Its line of railroad connects at several points with the railroads of other corporations, and, by virtue of these connections and certain traffic contracts and agreements, it has become a link in a through line of road, over which no part of the business thereof, freight and passengers are carried into and out of this commonwealth.

"3. Its authorized capital stock is twenty-five millions of dollars.

"4. From July 1, 1883, to July 1, 1885, it had an office in this commonwealth for the use of its officers, stockholders, agents and employés. Its main office is at Roanoke, Virginia.

"5. During this period it expended a considerable amount of money in Pennsylvania in the purchase of materials and supplies for the use of its road - but, with trifling exceptions, it owns no property and has no capital invested for corporate purposes within this commonwealth.

"6. It has paid no office license fee for the years named, as required by section sixteen of the act of 1879 (P. L. 168). Upon this section these settlements are based.

The exceptions of the defendant filed in the court below, and which were overruled in that court, except one relating to the manner of computation of interest, are printed on pages 43 and 44 of the transcript. The third, fourth and fifth of these exceptions present federal questions, and these exceptions were assigned in the specification of errors in the Supreme Court of Pennsylvania (see transcript, pp. 49 and 50), and are therefore properly before this court for review upon the assignments of the plaintiff in error.

These present the following questions:

1. Whether the license tax in question is in conflict with the clause 1, of section 2 of article IV of the constitution, which provides that, "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

2. Whether the license tax in question denies to the plaintiff in error the equal protection of the laws contrary to the provisions of the 14th amendment to the constitution and to the act of congress, revised statutes 1977.

3. Whether the license tax in question is in violation of

clause 4 of section 8 of article I of the constitution, which provides that, "Congress shall have power to regulate commerce with foreign nations and among the several states."

The first two questions presented are decided by the case of *Pembina Consolidated Silver Mining and Milling Co.* v. *Pennsylvania*, *125 U. S., 181*, which involved a license tax imposed by the statute now under consideration.

Upon the first question Mr. Justice Field, in the case cited, used the following language:

"2. Nor does the clause of the constitution declaring that the 'citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states,' have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause."

In support of this he cites *Paul* v. *Virginia*, *8 Wall. 168*; *Bank of Augusta* v. *Earl*, *13 Peters, 519*; *Ducat* v. *Chicago*, *10 Wall. 410*; *Fire Association* v. *New York*, *119 U. S. 110*, *120*.

As to the second question arising under the fourteenth amendment, he said:

"3. The application of the fourteenth amendment of the constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the constitution to the rights of citizens of one state to the privileges and immunities of citizens in other states. The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, 'The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.' *Providence Bank* v. *Billings*, 4 Pet. 514, 562. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the state. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it

pose the required license tax it was given the same protection in the use of the other that any other corporation having a similar office may claim. It would then have the equal protection of the law, so far as it had anything within the jurisdiction of the state, and the constitutional amendment requires nothing more. The state is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or having offices within its limits; provided, always, such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the state of its creation, that other states may be willing to admit within their jurisdiction, or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other states the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The states may, therefore, require for the admission within their limits of the corporations of other states, or of any number of them, such conditions as they may choose, without acting in conflict with the restraining provisions of the first section of the fourteenth amendment. As to the meaning and extent of that section of the amendment see *Barbier* v. *Connolly*, 113 U. S. 27; *Soon Hing* v. *Crowley*, 113 U. S. 703; *Missouri* v. *Lewis*, 101 U. S. 22, 30; *Missouri Pacific Railway Company* v. *Humes*, 115 U. S. 512; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Hayes* v. *Missouri*, 120 U. S. 68."

The third question is discussed in the opinion of the court cited, which contains a plain intimation that a state cannot exact conditions for allowing a corporation to do business or have offices there where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign, but in shown the corporation plaintiff in error in that case, was not within the class of corporations so engaged.

The only question open for discussion in this case, therefore, is whether the tax in question, as here applied, is a regulation of commerce.

As shown by the findings of fact, the plaintiff in error is a railroad corporation existing under the laws of the States of Virginia and West Virginia, and its main lines and branches lie wholly within those states. The lines of railroad connect

at several points with the railroads of other corporations, and by virtue of these connections and certain traffic contracts and agreements it has become a link in a through line of road, over which, as a part of the business thereof, freight and passengers are carried into and out of Pennsylvania. It expends considerable money in Pennsylvania in the purchase of materials and supplies for the use of its road, but, with trifling exceptions, it owns no property and has no capital invested for corporate purposes within this commonwealth. This is a finding, in substance, that it does no business in Pennsylvania as shown by the decision of the Supreme Court of Pennsylvania in *Commonwealth* v. *Standard Oil Co., 101 P. S. R. 119.*

In that case the meaning of the section above quoted, imposing a tax upon capital stock was in question. With reference to the terms "doing business," etc., the trial court found the following fact:

"4. During all the years aforesaid defendant made extensive purchases of crude petroleum in this state through resident brokers and others, to whom the necessary funds were sent from time to time without being permanently invested here. This petroleum was shipped to and refined at its refineries beyond the limits of this state." (p. 125.)

Referring to this finding, the Supreme Court of Pennsylvania said:

"We see no error in the conclusion of law which the learned judge arrived at upon his fourth finding of facts. That the purchases of oil in this state by a foreign corporation for the purpose of shipping to its refineries without the state, is doing business within this state, is a proposition that does not need serious discussion. It is true the charter of the Standard Oil Company authorizes it to deal in oil, but the finding of fact does not include such dealing. On the contrary the court finds that the petroleum was shipped to and refined at the company's refineries beyond the limits of the state. Thousands of corporations and individuals in other states make their purchases of supplies of raw material here, but it has never been seriously asserted that they were doing business in this state." (p. 148.)

In this case the commonwealth excepted to so much of the opinion of the trial court as is embraced in the following quo-

tation, and this exception was not sustained by the Supreme Court of Pennsylvania. The extract was as follows:

"We have, therefore, no hesitation in coming to the conclusion that the true construction of the act having only most confine the imposition of the tax to so much of the capital stock of defendant as was, during the years included in the settlement, represented by property and business of the defendant within the state. What was this proportion? We do not think that the purchases of petroleum, as set forth in the finding of facts No. 4, was such a 'doing business in this state' as was intended by the statutes. The act of May 1, 1869, seems to use the phrase 'go into operation' as synonymous with 'doing business,' and this must mean more than purchasing supplies in the state through agents. (P. L. 1868, p. 108.) So the act of June 7, 1879 (P. L. p. 113), enacts that no corporation chartered by this or any other state and 'doing business' in this commonwealth, shall 'go into operation' without first making certain reports, thus making 'doing business' equivalent to 'going into operation;' and in section 16, p. 130, foreign corporations which do not 'invest and use' their capital are required to obtain and pay for a license, thus making 'invest and use its capital' another equivalent for 'doing business.'" (p. 192.)

So much of the opinion was embraced in the specification. The learned judge below continued:

"In accordance with this construction it was held by McKennan, circuit judge, that purchasing materials here by a foreign corporation was not doing business in the state within the meaning of the act of April 22, 1874 (P. L. 108), to prohibit foreign corporations from doing business in Pennsylvania without having known places of business and authorized agents. *Missouri Furnace Company* v. *Cochran*, 11 *Phila.* L. J. (*N. S.*) 233. The same construction was adopted in *Parker Mills* v. *Commissioner of Taxes*, 23 *N. Y.* 192, where an act providing that all persons, not residents, doing business in the state, should be assessed and taxed on money invested in any manner in said business, was held not to apply to all cases where the goods of a non-resident were sent into the state and kept in store for sale." (p. 192.)

From these citations it appears that the Norfolk and Western railroad does not, within the meaning of the taxing statutes of Pennsylvania, as construed by her courts, invest or use its capital or do business in Pennsylvania, and that it is not in operation in this state. If the contrary were the fact, the corporation would not be subject to the license tax im-

posed upon it by the decisions rendered in the courts below in this case, but would be subject to a tax upon its property, that is, its capital stock, to the extent that the same was situated in Pennsylvania and employed in the business and operations of the company here, or here invested and used. If the business of this corporation is the carrying on of interstate commerce, it is clear, from the findings of fact, and from the imposition of the tax, that that business is not carried on within Pennsylvania. The corporation is engaged in interstate commerce in other states. It maintains an office in this state for the use of its officers, stockholders, agents and employés, and it is for the maintenance of this office that the license is exacted.

This case is like that of *Cooper Manufacturing Co.* v. *Ferguson, 113 U. S. 727, 732.* In that case it appeared that the constitution of Colorado provided that no foreign corporation should do business within the state, without having one or more known places of business, and an authorized agent or agents in the same upon whom process might be served. The legislature of the state enacted that foreign corporations, being authorized to do business in the state, should file a certificate with the Secretary of State and the recorder of the county in which the principal business was carried on, designating the principal place of business and the agent there on whom process might be served. A corporation of Ohio, without filing a certificate, contracted in Colorado to manufacture machinery at its place of business in Ohio, and to deliver it in Colorado. Held, that this act did not constitute a carrying on of business in Colorado, and was not forbidden by its constitution and law.

In concluding the opinion, Mr. Justice Woods said:

"We base the conclusion that the demurrer to the defendant's answer should have been sustained upon the interpretation we have given to the constitution and the statute (of Colorado), and do not find it necessary to decide whether their provisions invade the exclusive right of congress to regulate commerce among the several states."

It is submitted that the reason why the learned court found this unnecessary was because it had already declared that the corporation in question had done no business in Colorado.

The argument on behalf of the plaintiff in error assumes that the business in which the corporation is engaged in Pennsylvania is interstate commerce, and that the office in question is necessarily for the convenient or successful prosecution of that business. There is nothing in the findings of fact to show that the office in Pennsylvania has any relation to the commerce carried on by the corporation, or that the office is at all necessary for any business of the corporation. So the case stands upon the record.

The argument of the plaintiff in error, however, is not based upon the facts found by the court, but upon the proof admitted in its behalf in the court below. Those proofs show that the Norfolk & Western Railroad Co., by a contract referred to, marked "Exhibit A" (Transcript p. 18), entered into a temporary agreement with the East Tennessee, Virginia and Georgia and the Shenandoah Valley railroad companies, for the management of traffic common to all the roads, by a joint committee of three. The agreement provides for the appointment of a general manager of the matters made joint and common by the agreement, and that the office of said manager shall be located as near as possible in the center of the lines as may be agreed upon by the joint committee. None of these lines extend into Pennsylvania, and there is nothing to show that the office in Philadelphia had any relation to the business done under this agreement.

By another agreement in evidence, marked "C," the Norfolk & Western, Pennsylvania, Cumberland Valley, Western Maryland, Shenandoah Valley and East Tennessee, Virginia and Georgia railroad companies entered into an agreement for the transaction of certain through freight business for their joint benefit, the carrying to be done by a line of cars marked "Great Southern Dispatch," those cars to be furnished and set aside for the exclusive use of the business contemplated by the agreement. The 14th clause of the agreement (Transcript, p. 29) makes the general manager of the East Tennessee, Virginia and Georgia Railroad Co., general manager of the Great Southern Dispatch line, and the auditor of the Shenandoah Valley R. R. Co. agent of the clearing house established for the convenient transaction of the business of the Great Southern Dispatch. Evidently the business done

under this contract is done independently of the office of the Norfolk & Western in Pennsylvania.

An examination of agreement "D" (Transcript, p. 29), shows that it has little or no relevancy to this case. In effect, it makes the line of the Washington, Ohio and Western Railroad Company, a Virginia corporation, a part of the system of the Norfolk & Western for some purposes of traffic.

The other business referred to in the proofs consists of the ordinary through traffic done by a railroad company by taking up transportation at one of its termini and putting it down at another, the carriage originating or terminating beyond such termini. As already shown, none of the lines of the Norfolk & Western Railroad Company enter Pennsylvania and no relation between this business and the maintenance of the Philadelphia office is shown by the findings of fact.

JOHN F. SANDERSON,
Deputy Attorney General,
WILLIAM S. KIRKPATRICK,
Attorney General.

APPENDIX.

AN ACT *to provide revenue by taxation.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same,* That hereafter no institution or company, incorporated or organized by or under any law of this commonwealth, general or special, or incorporated or organized under the laws of any other state and doing business in this commonwealth, shall go into operation without first having the name of the institution or company, the date of incorporation or organization, the act of assembly or authority under which incorporated or organized, the place of business, the post office address, and names of the president, secretary and treasurer, the amount of capital authorized by its charter, and the amount of capital paid into the treasury of the company, registered in the office of the auditor general; and every institution or company now engaged in business in this commonwealth shall, within ninety days after the passage of this act, register as herein required in the office of the auditor general; and any such institution or company which shall neglect or refuse to comply with the provisions of this section, shall be subject to a penalty of five hundred dollars, which penalty shall be collected on an account settled by the auditor general and state treasurer, in the same manner as taxes on stock are settled and collected.

SECTION 2. That hereafter, except in the case of banks, savings institutions and foreign insurance companies, it shall be the duty of the president or treasurer of every company now or hereafter incorporated by or under any law of this commonwealth, and of every company now or hereafter incorporated by any other state or territory of the United States or foreign govern-

ment, and doing business in this commonwealth, or having capital employed in this commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, to make report in writing to the auditor general annually, in the month of November, stating specifically the total authorized capital stock of the company, the whole number of shares of stock, the number of shares of stock issued, the par value of each share, the amount paid into the treasury of the company on each share, the amount of capital paid in, the date, amount and rate per centum of each and every dividend made or declared by their respective corporations during the year ending with the first Monday in said month; and in all cases where any such company shall fail to make or declare any dividend upon either its common or preferred stock during the year ending as aforesaid, or in case the dividend or dividends made or declared on either its common or preferred stock during the year ending as aforesaid shall amount to less than six per centum upon the par value of the said common or preferred stock, the treasurer and secretary thereof, after being duly sworn or affirmed to do and perform the same with fidelity, according to the best of their knowledge and belief, shall, between the first and fifteenth days of November of each year in which no dividend has been made or declared as aforesaid, or in which the dividend or dividends made or declared upon either its common or preferred stock amounted to less than six per centum upon the par value of said common or preferred stock, estimate and appraise the capital stock of such company upon which no dividend has been made or declared or upon the par value of which the dividend or dividends made or declared amounted to less than six per centum, at its actual value in cash, not less however than the average price which said stock sold for during said year, and not less than the price or value as indicated or measured by the amount of the dividends made or declared, and when the same shall have been so truly estimated and appraised, they shall forthwith forward to the auditor general a certificate thereof, accompanied by a copy of their said oath or affirmation by them signed, and attested by the magistrate or

Capital stock to be appraised in certain cases.

other person qualified to administer the same: *Provided*, That if the auditor general or state treasurer, or either of them, is not satisfied with the valuation so made and returned, they are hereby authorized and empowered to make a valuation thereof, and to settle an account on the valuation so by them made for the taxes, penalties and interest due the commonwealth thereon, and any corporation or company dissatisfied with such settlement may appeal therefrom, in the manner now provided by law for appeals from settlement of accounts by the auditor general and state treasurer.

SECTION 3. That if the said officers of any such corporation or company shall neglect or refuse to furnish the auditor general, on or before the thirty-first day of December in each and every year, with the report aforesaid, or the report and appraisement as the case may be, as required by the second section of this act, it shall be the duty of the accounting officers of the commonwealth to add ten per centum to the tax of said corporation or company for each and every year for which such report or report and appraisement were not so furnished, which percentage shall be settled and collected with the said tax in the usual manner of settling accounts and collecting such taxes: *Provided*, That if the officers of any such corporation or company shall intentionally fail to comply with the provisions of the second section of this act for three successive years, the auditor general shall report the fact to the governor, who, if he shall be satisfied that such failure was intentional, shall thereupon by proclation declare the charter of said corporation or company forfeited and its chartered privileges at an end, whereupon the same shall cease, end and be determined.

SECTION 4. That every company or association whatever, now or hereafter incorporated by or under any law of this commonwealth, or now or hereafter incorporated by any other state or territory of the United States or foreign government, and doing business in this commonwealth, or having capital employed in this commonwealth in the name of any other company or corporation, association or associations, person or persons, or in any other manner, except foreign insurance companies, banks and savings institutions, shall

be subject to and pay into the treasury of the commonwealth annually, a tax to be computed as follows, namely: If the dividend or dividends made or declared by such company or association as aforesaid, during any year ending with the first Monday of November, amount to six or more than six per centum upon the par value of its capital stock, then the tax to be at the rate of one-half mill upon the capital stock for each one per centum of dividend so made or declared; if no dividend be made or declared, or if the dividend or dividends made or declared do not amount to six per centum upon the par value of said capital stock, then the tax to be at the rate of three mills upon each dollar of a valuation of said capital stock made in accordance with the provisions of the second section of this act; and in case any such company or association shall have more than one kind of capital stock, as for instance common and preferred stock, and upon one of said stocks a dividend or dividends amounting to six or more than six per centum upon the par value thereof has been made or declared, and upon the other no dividend has been made or declared, or the dividend or dividends made or declared thereon amount to less than six per centum upon the par value thereof, then the tax shall be at the rate of one-half mill for each one per centum of dividend made or declared upon the capital stock, upon the par value of which the dividend or dividends made or declared amount to six or more than six per centum, and in addition thereto tax shall be charged at the rate of three mills upon each dollar of a valuation, made also in accordance with the provisions of the second section of this act, of the capital stock upon which no dividend was made or declared, or upon the par value of which the dividend or dividends made or declared did not amount to six per centum; and it shall be the duty of the treasurer or other officer having charge of any company or association upon which a tax is imposed by this section of this act, to transmit the amount of said tax to the treasury of the commonwealth, within fifteen days from thirty-first day of December, in each and every year: *Provided*, That whenever such corporation or company shall make any profit and add the same to its

Tax where dividend amounts to six per cent.

Tax when in cases of less than six per cent. dividend.

Where profit added to sinking fund.

sinking fund, without a division thereof amongst its stockholders, the amount of the profit thus added to its sinking fund shall be included in the report required by the second section of this act to be made, and for the purpose of this act the same shall be treated as having been divided amongst the stockholders, and shall enter at the capital stock to taxation as a dividend: *Provided, however*, That said money or any part thereof shall be expressly set apart for the payment of debts.

Limited partnerships, organized under the laws of this state or of any other state or territory, or of the United States, or under the laws of any foreign state, kingdom or government, and doing business in this state, and owning, operating, or leasing to or from another corporation, company, or limited partnership, any railroad, canal, pipe line, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, shall be subject to all the provisions of sections one, two, three, and four of this act applying to corporations, and shall pay into the treasury of the commonwealth annually a tax on the capital stock of such limited partnerships, at the same rate at the same times, and to be ascertained and computed in the same manner, as is therein provided in the cases of corporations.

SECTION 5. That limited partnerships, organized under or pursuant to the laws of this state or of any other state or territory, or of the United States, or under the laws of any foreign state, kingdom, or government, and doing business in this state, and owning, operating, or leasing to or from another corporation, company, or limited partnership, any railroad, canal, pipe line, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, shall be subject to all the provisions of sections one, two, three, and four of this act applying to corporations, and shall pay into the treasury of the commonwealth annually a tax on the capital stock of such limited partnerships, at the same rate at the same times, and to be ascertained and computed in the same manner, as is therein provided in the cases of corporations.

SECTION 6. That limited partnerships organized under or pursuant to the laws of any other state or territory, or of the United States, or under the laws of any foreign state, kingdom or government, and doing business in this state, and limited partnerships, that now or may hereafter be organized under or pursuant to the laws of this state, shall be subject to all the provisions of sections one, two, three, and four of this act applying to corporations, and shall pay into the treasury of the commonwealth annually, a tax on the capital stock of such limited partnership, at the same rate and times, and to be ascertained and computed in the same manner, as is therein provided in the cases of corporations: *Provided*, That for the purposes of this act interests in limited partnerships shall be deemed to be capital stock and

Interests in limited partnerships to be deemed capital stock for purposes of taxation.

Exceptions.

taxable accordingly, and any division of profits amongst the owners of such interests shall be taxable as dividends for the purposes of taxation: *Provided further*, That the provisions of this section shall not apply to limited partnerships organized for manufacturing or mercantile purposes.

Section 7. That every railroad company, canal company, pipe line company, conduit company, steamboat company, slack-water navigation company, transportation company, street passenger railway company, and every other company or limited partnership, now or hereafter incorporated or organized by or under any law of this commonwealth, or now or hereafter incorporated or organized by any other state, and doing business in this commonwealth, and owning, operating, or leasing to or from another corporation, company or limited partnership, any railroad, canal, pipe line, slack-water navigation, or street passenger railway, or other device for the transportation of freight or passengers, or in any way engaged in the business of transporting freight or passengers, and every telegraph company incorporated under the laws of this or any other state and doing business in this commonwealth, and every express company, and any palace car and sleeping car company, incorporated or unincorporated, doing business in this commonwealth, shall pay to the state treasurer for the use of the commonwealth a tax of eight-tenths of one per centum upon the gross receipts of said company for tolls and transportation, telegraph business or express business; the said tax shall be paid semi-annually upon the last days of July and January in each year, the first payment to be due on the last day of July, Anno Domini one thousand eight hundred and seventy-nine; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of said company or limited partnership, to transmit to the auditor general a statement, under oath or affirmation, of the amount of gross receipts of the said company or limited partnership, derived from all sources during the preceding six months ending on the first days of July and January; and if any such company or limited partnership shall

Tax on gross receipts of corporations and limited partnerships engaged in transportation.

When payable.

Reports to auditor general.

neglect or refuse for a period of thirty days after such tax becomes due, to make said returns or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the commonwealth as other taxes are recoverable by law from said companies or limited partnership: *Provided*, That whenever any corporation, company, or limited partnership, liable to a tax on gross receipts under the provisions of this section, possesses and exercises the right to mine or purchase and sell coal, the receipts derived purely from the sale of coal so mined or purchased by said company or limited partnership shall not be taxed, but every such company or limited partnership shall keep an account of the said coal, and in the said account shall charge itself with the transportation thereof, at the same rates as are charged or would be charged by the said company or limited partnership for the transportation of similar freight for other companies or individuals, and the sums so charged for transportation shall be returned by the said company or limited partnership to the auditor general, and shall be taxed as a part of the gross receipts of said company or limited partnership: *And provided further*, That in any case where the works of one corporation, company, or limited partnership are leased to and operated by another corporation, company, or limited partnership, the taxes imposed by this section shall be adjusted between the said corporations, companies, or limited partnerships, in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the commonwealth shall first look to the corporation, company, or limited partnership operating the works, and upon payment by the said company or limited partnership of a tax upon the entire receipts derived from the operation thereof, the corporation, company, or limited partnership from which the said works were leased, shall not be held liable under this section for any tax upon the proportion of said receipts received by it as rental for the use of said works.

SECTION 8. That hereafter it shall be the duty of the president, secretary or other public officer of each and every insurance company or association, incorporated by or under any law of the commo-

wealth, except companies doing business upon the purely mutual plan without any capital stock or accumulated reserve, and purely mutual beneficial associations, whose fund for the benefit of members, their families or heirs, is made up entirely of the weekly or monthly contributions of their members and accumulated interest thereon, to make report in writing to the auditor general semi-annually, upon the first day of July and January in each year, setting forth the entire amount of premiums received by such company or association during the preceding six months, whether the said premiums were received in money or in the form of notes, credits or any other substitute for money; and every such company or association shall pay into the state treasury, at the dates aforesaid, a tax of eight-tenths of one per centum upon the gross amount of said premium: *Provided*, That said report shall be made under oath or affirmation, and that it shall be the duty of the accounting officer of the commonwealth to add ten per centum to the account of any company or association whose officers shall neglect or refuse for a period of thirty days to make said report, or to pay into the state treasury the tax imposed by this section.

Tax thereon.

Neglect to report or pay tax.

Coal corporations and limited partnerships to report semi-annually.

SECTION 9. That every corporation or limited partnership, incorporated or organized by or under any law of this commonwealth, or incorporated or organized by or under any law of any other state and doing business in this commonwealth, which possesses the right under its charter to own, purchase or lease coal lands, or to mine, purchase and sell coal, or in any way engages in the business of mining, purchasing or selling coal, shall, semi-annually, upon the first days of July and January, in each and every year, make report, under oath or affirmation, to the auditor general of the number of tons of coal mined during the six months preceding the said first day of July and January, by such company or limited partnership, and also of the number of tons of coal that shall be mined by any unincorporated association, partnership, or individual, under any lease, contract, grant or mining privilege upon the property of which the company or limited partnership making such report is the owner or lessee, or has any mining or coal privileges or in.

terest therein, and also of the number of tons not mined as aforesaid, which shall have been purchased during the same period, by the said company or limited partnership, and shall pay into the treasury of the commonwealth an additional tax upon its corporate franchises, or if a limited partnership, upon its privileges created by or used within this commonwealth, at the rate of three cents upon each and every ton of two thousand two hundred and forty pounds of coal so mined or purchased as aforesaid, until July first, one thousand eight hundred and eighty, and one cent upon each and every ton of two thousand two hundred and forty pounds of coal so mined or purchased as aforesaid, until July first, eighteen hundred and eighty-one, and after the said first day of July, eighteen hundred and eighty-one, the said tax on coal hereinbefore provided shall wholly cease and determine: *Provided*, That the amount of coal consumed in the transaction of its business by any such company or limited partnership, shall not be included in its return, this not to exempt coal manufactured into coke, unless such coke is consumed in the transaction of its business: *And provided further*, That said tax shall not be payable more than once in respect to the same ton of coal, and that where a corporation or limited partnership has heretofore entered into a contract with a corporation or corporations to purchase its coal at a fixed price or basis per ton, the corporation so purchasing the coal shall pay the tax herein imposed: *And provided also*, That if any such company or limited partnership shall neglect or refuse, for a period of thirty days after such tax becomes due, to make said return or to pay the same, the amount thereof, with an addition of ten per centum thereto, shall be collected for the use of the Commonwealth as other taxes are recoverable by law from said companies.

Tax on franchises or privileges of same.

Coal consumed by same company.

But not coal manufactured into coke.

Tax not payable more than once.

Tax to be paid by purchaser of coal in certain cases.

Penalty for neglect.

SECTION 10. That every private banker and broker, and every unincorporated banking and saving institution, express company, palace car company and sleeping car company, and all corporations incorporated by or doing business in this commonwealth, except those liable to a tax on capital stock or gross receipts under the pro-

Private bankers and brokers and certain corporations to pay tax on net earnings or income.

visions of this act, and banks, trust companies and savings institutions having capital stock, and foreign insurance companies licensed in pursuance of the several acts in relation thereto, shall annually, upon the first Monday of November of each year, make report to the Auditor General, under oath or affirmation, setting forth the entire amount of net earnings or income received by said individuals, company or corporation, from all sources during the preceding year; and upon such net earnings or income, the said individual, company or corporation, as the case may be, shall pay into the state treasury for the use of the state, within sixty days there after, threeper centum upon such annual net earnings or income, in addition to the taxes imposed by the preceding sections of this act; and in case any corporation, company or individual shall neglect or refuse to make the report required by this section to the auditor general, on or before the thirty-first day of December, such corporation, company or individual, shall be liable to a penalty of ten per centum for such neglect, which shall be added to the amount of tax found due in the settlement of their account.

Penalty for neglect.

Assignment of revenue to certain funds.

SECTION 11. That one-half the taxes imposed by the fourth section of this act, and the revenues derived therefrom, until the first day of November, Anno Domini one thousand eight hundred and eighty, shall be assigned to the sinking fund of this commonwealth, and that after that time the whole of the revenue derived from this source shall be assigned to the sinking fund, and the half of the revenue under the fourth section of this act, until the first day of November, Anno Domini one thousand eight hundred and eighty, and all other taxes imposed by this act, and the revenues derived therefrom, shall be applicable to the payment of the ordinary and current expenses of the government.

Power of accounting officers to examine

SECTION 12. That the auditor general and state treasurer, or any agent appointed by them, or either of them, are hereby authorized to examine the books and papers of any corporation, institution, company, or limited partnership made taxable by this act, to verify the accuracy of any return made under the provisions of this or any other act of assembly.

Rate of interest to be paid by delinquents.

SECTION 13. That in the settlement by the auditor general and state treasurer of all accounts for taxes due the commonwealth, they shall charge interest upon the amount of tax or balance or balances found due the commonwealth, at the rate of twelve per centum per annum from thirty days after the time said taxes or balances became due and payable, to the time of the settlement of the same; and all balances due the commonwealth, on account settled by the auditor general and state treasurer, shall bear interest from sixty days after date of settlement, at the rate of twelve per centum per annum until the same are paid, and any judgment recovered thereon shall bear interest at the rate of twelve per centum per annum until paid; and the payment of interest as aforesaid shall not relieve any corporation from any of the penalties or commissions prescribed by law for neglect or refusal to furnish reports to the auditor general, or to pay any claim due to the commonwealth from such corporation: *Provided*, That the auditor general shall first have sent to such corporation a statement of amount due.

Taxes to be a lien.

SECTION 14. That all taxes imposed by this act shall be a lien upon the franchises and property, both real and personal, of corporations and limited partnerships, from the time the said taxes are due and payable; and whenever the franchises or property of a corporation or limited partnership shall be sold at a judicial sale, all taxes due the commonwealth shall first be allowed and paid out of the proceeds of such sale, before any judgments, mortgages, or other claims which shall be entered of record or become a lien after the passage of this act.

No corporation or limited partnership to be dissolved until taxes are paid.

SECTION 15. That no corporation or limited partnership made taxable by this act shall hereafter be dissolved by the decree of any court of common pleas, until all taxes due the commonwealth have been fully paid into the state treasury, and the certificate of the auditor general, state treasurer, and attorney general to this effect filed in the proper court, with the proceedings for dissolution.

Foreign corporations in certain cases to pay license tax.

SECTION 16. That from and after the first day of July, Anno Domini one thousand eight hundred and seventy-nine, no foreign corporation,

except foreign insurance companies, which does not invest and use its capital in this commonwealth, shall have an office or offices in this commonwealth for the use of its officers, stockholders, agents, or employés, unless it shall first have obtained from the auditor general an annual license so to do, and for said license every such corporation shall pay into the state treasury, for the use of the commonwealth, annually, one-fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor general shall not issue a license to any corporation until said license fee shall have been paid. The auditor general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section, for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same: *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this act, or whose capital stock or a majority thereof is owned or controlled by a corporation of this state which does pay a tax under any previous section of this act.

No license necessary in certain cases.

Moneys at interest and bank stock taxed for state purposes.

SECTION 17. That all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment, also all articles of agreement and accounts bearing interest, owned or possessed by any person or persons whatsoever (except notes or bills for work or labor done, and all obligations given to banks for money loaned, and bank notes), also all shares of stock in any bank, banking or savings institution, or company now or hereafter incorporated by or in pursuance of any law of this commonwealth, and all public loans or stocks whatsoever, except those issued by this commonwealth or the United States, and all money loaned or invested at interest in any other state, and all other moneyed capital in the hands of individual citizens of the state shall be and are hereby made taxable for state purposes at the rate of four mills on every dollar of value thereof annually: *Provided*, That all mortgages, judgments, recognizances, and moneys due or owing upon articles of agreement for the sale of real estate shall, after the passage of this act, be exempt from all

taxation, except for state purposes; and all corporations paying interest on loans hereby taxed for state purposes only, shall deduct the said tax from the said interest and pay the same into the state treasury; and in case any bank or savings institution incorporated by this state, or any national bank, elect to collect annually from the shareholders thereof a tax of six-tenths of one per centum upon the par value of all the shares of said bank or savings institution, and pay the same in the state treasury on or before the twentieth day of June in each and every year, the shares, capital, and profits of such bank shall be exempt from all other taxation under the laws of this commonwealth; and the law regulating the compensation of county treasurers for receiving moneys for the use of the commonwealth, and paying over the same, is hereby extended to the cashier of said bank and savings institution; and the office of assessor provided for under the second section of the act entitled "An act to increase the revenues of the commonwealth by taxation of the shares of the stock of national banks," approved the twelfth day of April, Anno Domini one thousand eight hundred and sixty-seven, be and are hereby abolished; the shares of stock of such banks or savings institution shall hereafter be assessed as follows: It shall be the duty of the president or cashier of any national bank, banking, or savings institution, incorporated under the laws of this commonwealth or of the United States, which are taxable under this act, to make report, in writing, to the auditor general, on or before the first day of March of each year, stating specifically, the amount of capital stock, and the amount paid in, a full and complete list of shareholders of each bank or savings institution, with their residence, and the number and par value of shares of stock held by each person respectively, value of said stock in the market where such bank is located, during the year ending with the first day of March, which said report shall be made under oath of the said president or cashier, before some officer qualified to administer the same, and the said president or cashier shall also furnish a duplicate of the said report, in writing, under oath, to the commissioners of the proper city or county in which

Corporations paying interest on loans to deduct tax and pay same into state treasury.

Banks may elect to collect from shareholders and pay tax, and in such case shares exempt from all other taxation.

Office of bank assessor abolished.

How bank shares to be assessed.

Auditor general empowered to adjust assessments.

Penalty in case of neglect.

such bank or institution is located. The auditor general shall have power to adjust such assessments, by inquiring into the value of such stock, and either abate or increase the value of the same, as may be just and proper; if the said bank officers shall neglect or refuse to furnish the auditor general, on or before the first day of March in each and every year, with the report aforesaid, it shall be the duty of the accounting officers of the commonwealth to add ten per centum to the tax of said corporation, for each and every year for which percentage shall be settled and collected with the said taxes in the usual manner of settling accounts and collecting taxes. That the limitation of the amount of state tax to be raised on personal property to the sum of five hundred thousand dollars, contained in the third section of the act of twenty-fourth of May, one thousand eight hundred and seventy-eight, entitled "An act defining the powers and extending the duties of the board of revenue commissioners," in words as follows: "Which tax shall not, as finally adjusted, exceed in the aggregate the sum of five hundred thousand dollars," be and the same is hereby repealed.

Repeal of limitation of state tax to be raised on personal property.

Laws inconsistent herewith repealed.

SECTION 18. That this shall go into effect immediately, and that all laws or parts of laws inconsistent herewith, or which are hereby substantially reënacted, be and the same are hereby repealed, saving, reserving, and excepting unto the commonwealth the right to collect any taxes accrued or accruing under the said laws or parts of laws and sections, or any of them, prior to the date of the approval of this act: *Provided however*, That taxes shall not be collected for the same period of time under any such repealed law, and under any substantial reënactment of the same herein contained.

HENRY M. LONG,
Speaker of the House of Representatives.
CHARLES W. STONE,
President of the Senate.

APPROVED—The 7th day of June, A. D. 1879.
HENRY M. HOYT.

Office Supreme Court U. S.
FILED.
APR 28 1890
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

No. 294, October Term, 1889.

Norfolk and Western Railroad Company

vs.

Commonwealth of Pennsylvania.

Writ of Error to Supreme Court of Pennsylvania.

Supplemental Brief on Behalf of the Commonwealth.

JOHN F. SANDERSON,
Deputy Attorney General.
WILLIAM S. KIRKPATRICK,
Attorney General.

IN THE

Supreme Court of the United States.

No. 294, October Term, 1889.

NORFOLK & WESTERN R. R. COMPANY

vs.

COMMONWEALTH OF PENNSYLVANIA.

SUPPLEMENTAL BRIEF ON BEHALF OF THE COMMONWEALTH.

The brief already submitted on behalf of the Commonwealth argues in favor of the tax, upon the ground that the plaintiff in error is not doing business in Pennsylvania, and is therefore not subject to a tax on its business, which is alleged to be inter-State commerce.

The argument is that the 16th section of the Act of 1879 imposes the office license tax on such companies as have an office or offices in the Commonwealth for the use of its officers, stockholders, agents, or employes, and which do not invest or use their capital in the Commonwealth, and are not subject to taxation under previous sections of the Act of 1879. The previous sections, among others, are section 4, which imposes a capital stock tax upon all corporations, domestic or foreign, doing business in the Commonwealth, and section 7, which taxes all transportation companies, domestic or foreign, in any way engaged in the business of transporting freight or passengers within the State.

The argument further shows that the court below, in negativing the fifth point submitted by the defendant (Transcript, p. 38) in effect declared as a matter of fact, and contrary to the contention of the defendant, that the maintenance of the office in Pennsylvania was not necessary for the successful carrying on of inter-State business. It further shows that no relation exists, in fact, between the office in Philadelphia, maintained for the use of its officers, stockholders, agents, and employes, and the transportation effected through its connections and traffic contracts, (Transcript, pp. 38, 39.) This is the proper inference from the Findings of Fact. At all events, no relation is affirmatively shown. The case is therefore put in the original brief upon the ground that the court below has decided that the company is taxable under the 16th section, and does not fall, as a matter of fact, within the provisions of the former sections of act, which include transportation companies doing business in Pennsylvania.

It may be added in this connection that the findings of fact in the court below, as well as the proofs, are barren of any explicit showing as to what is done in the Pennsylvania office, what officers, stockholders, agents, or employes occupy it, or how they are there actually employed. Beyond the statement in the deposition of the Treasurer and Comptroller, that his office is in Philadelphia, and the statement that the interest upon the coupons of the bonds is paid in Philadelphia, the further general statements of that officer as to the necessity and convenience of the office are negatived by the refusal of the court to find, as matter of fact, that the office was necessary for the successful carrying on of inter-State business.

This summary statement is made for the purpose of defining the question to be discussed. It may be conceded that this court will decide for itself, as a matter of law, upon the facts found, whether the company is doing such a business in Pennsylvania as amounts to the transaction of inter-State commerce therein, and whether the tax in question is a tax upon such business.

It is submitted, however, that the findings of fact fail to show that the tax in any wise operates upon any transaction in Pennsylvania done by the company which amounts to an operation of inter-State commerce. For all that appears—and the burden is upon him who seeks to escape the tax to make out the facts to sustain the constitutional objection—the office is maintained for no other purpose than to discharge the corporation functions connected with stockholders' or directors' meetings, or that general corporate business, common to all corporations, which pertains to its ordinary internal concerns, its financial transactions, transfers of its stock, or the like. These, of course, have no such relation to its inter-State commerce business, if it transacts any such in Pennsylvania, as that to tax them would be to burden that commerce.

The argument for the plaintiff in error affirms that commerce cannot be prohibited; that the railroad may contract for inter-State transportation; that it does so contract; that this is commerce; and that the office is necessary for the purposes of the business under such contracts. As already shown, the latter fact is negatived.

What is the proper deduction to be drawn from the second Finding of Fact? (Transcript, p. 39.) It is in these words:

"2. Its line of railroad connects at several points with the railroads of other corporations, and by virtue of these connections and traffic contracts and agreements, it has become a link in a through line of road over which, as part of the business thereof, freight and passengers are carried into and out of this Commonwealth."

Read in the light of knowledge of common transactions of connecting railway companies, this finding means that this railroad company takes up freight and passengers at various points upon its line, or receives them from its connections, in Virginia and forwards them upon through waybills or tickets over connecting lines to their destination in or beyond Pennsylvania, and that, similarly, freight and

passengers are taken up at points in or beyond Pennsylvania, upon the lines of connecting roads, and forwarded out of Pennsylvania, through Maryland, into Virginia, to and upon the road of this company, to be put down, or forwarded to an ultimate destination.

Contracts made by the Norfolk and Western Railroad Co. for such freight and passengers as it takes up or forwards, would naturally be made where they were taken up to be forwarded, that is, in the States of Virginia and West Virginia. Conversely, contracts for the transportation of freight and passengers, received by the Pennsylvania connections of the Norfolk and Western, would be made by such Pennsylvania connections, and in either case the contracts would be performed by and upon the roads of the carrying companies, each for itself. It cannot be inferred that the Norfolk and Western Railroad Company contracts at the ticket offices and freight stations of its Pennsylvania connections, to carry freight and passengers there delivered, and destined to be carried during some part of their journey upon its line.

The finding refers to traffic contracts and agreements. If these are looked into it will appear, as shown by the brief already filed, that the business done under the contracts and agreements, is not transacted by the Norfolk and Western Railroad Company proper, but by certain independent agencies created by the agreements.

It is submitted, therefore, that there is nothing in the Findings of Fact, properly construed, in any wise tending to show that the office license tax has any relation to or bearing upon the business of the company, so far as that business is inter-State commerce, or that the office in question has any necessary relation to such business.

If any federal question arises upon the facts found, it must be stated in the following form:

Can a State prohibit the ownership or occupancy of her soil by a foreign corporation which is engaged in inter-State commerce, but which possesses no powers conferred by

Congress for that purpose; or can a State prohibit the exercise of a corporate franchise within it by a foreign corporation which is engaged in inter-State commerce, but which franchise bears no necessary relation to that commerce?

This question is an open one. It has been said in several cases, in substance, that the only limitation upon the power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing a corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government or where its business is strictly commerce, inter-State or foreign. The control of such commerce, being in the Federal government, is not to be restricted by State authority.

Broadly stated, the question may be put in this form: Can a State, by a general and indiscriminate declaration, forbid foreign corporations from doing business or exercising franchises within its limits? The argument does not touch upon the power of Congress to incorporate or confer corporate franchises upon corporations for the operation of post roads, telegraphs, military roads, (railroad or other,) or carry on banking or ship-building, or the manufacture of munitions of war, or other supplies for the general government, or otherwise to be employed as a federal agency, for no such legislation of Congress is in question.

A franchise is a branch of the sovereign prerogative. It emanates from and exists within the sovereignty. It has no legal force or validity beyond the territorial limits of that sovereignty. By comity only is a foreign corporation recognized, and that comity is strictly of grace. This is the common law doctrine, well understood when the Constitution was adopted, clearly asserted in the *Bank of Augusta* v. *Earl*, and yet unmodified.

The Constitution declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. This declaration, which might

have embraced all persons, natural or artificial, is limited to citizens. To enumerate is to exclude, hence the persons, natural or artificial, who are not citizens, have no right under this clause of the Constitution. As applied to corporations, such is the doctrine of this court declared in the case of *Paul* v. *Virginia*, and other cases.

The Fourteenth Amendment defines citizenship. It declares that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

This amendment was made when the conditions of business were in general similar to those which now prevail, and when the importance of corporations, as business and commercial agencies, was fully understood. But here "privileges and immunities" are confined to citizens. Persons, including corporations, are entitled to the equal protection of the laws. Here again the argument from exclusion is well founded. A corporation of one State, therefore, can have no privileges or immunities in another State under the Constitution. Whether it shall be admitted or not is in general for the State to determine. Once admitted, it is entitled to the equal protection of the laws.

The commercial clause declares that Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes. This declaration was made, not only in view of the manner in which commerce was done, but of the kinds of persons by whom the operations of commerce were conducted. It was made in view of the undoubted legal principle that corporate persons have no powers of any kind, except by comity or permission, beyond the limits of the sovereignty

which created them. It conferred upon such no new power. It left within the State, therefore, the authority to determine what powers should be possessed by corporations and how far they should be recognized.

Congress, it has been held, has silently willed that commerce shall be free, that is to say, free from State restriction or regulation in matters which admit of a general plan and uniformity. But this silence cannot confer a positive authority upon an artificial person, or create in a corporation a capacity which it did not before possess.

These considerations are submitted in support of the power of a State to exclude a foreign corporation positively and unconditionally, and they find support in the dissenting opinion of Mr. Justice Field, in the case of *Western Union Telegraph Co.* v. *Pensacola Telegraph Co., 96 U. S., p. l.* He said: "The position advanced that if a corporation be in any way engaged in commerce, it can enter and do business in another State without the latter's consent, is novel and startling. There is nothing in the opinion in *Paul* v. *Virginia*, which gives any support to it."

He then points out the true doctrine of that case, and continues:

"It would have been outside of the case for the court to have expressed an opinion as to the power of Congress to authorize a foreign corporation to do business in a State, upon the assumption that issuing a policy of insurance was a commercial transaction. And it is impossible to see any bearing of the views, which were expressed upon the doctrine advanced here, that a corporation of one State, in any way engaged in commerce, can enter another State and do business there without the latter's consent. Let this doctrine be once established, and the greater part of the trade and commerce of every State will soon be carried on by corporations created without it. The business of the country is to a large extent conducted or controlled by corporations; and it may be, as was said by this court in the case referred to, 'of the highest public interest that the number of corporations in the State should be limited, that they should be required to give publicity to their transactions, to submit their affairs

to proper examination, to be subject to forfeiture for their corporate rights in case of mismanagement, and that their officers should be held to a strict accountability of the manner in which the business of the corporations is managed, and be liable to summary removal.' All these guards against corporate abuses the State would be incapable of taking against a corporation of another State operating a railway or a telegraph line within its borders under the permission of Congress, however extortionate its charges or corrupt its management. The corporation might have a tarriff of rates and charges prescribed by its charter, which would be beyond the control of the State; and thus, by the authority of Congress, a State might be reduced to the condition of having the rates of charges for transportation of persons and freight and messages within its borders regulated by another State. Indeed, it is easy to see that there will remain little of value in the reserved rights of the States, if the doctrine announced in this case be accepted as the law of the land."

It is submitted that the views here advanced are applicable to the present case. The case in which the dissent was filed was decided on the ground that Congress, by the statute of July 24, 1866, had conferred the authority contended for upon the Western Union Telegraph Company, and that such authority gave it the power to enter and do business within the State as against a statute of the State conferring exclusive privileges upon a domestic corporation. Not only was the decision put upon this ground and the general question left undecided in the Pensacola case, but the Court, in the opinion, pointed out that the question arose between private parties. The Court said:

"Upon principles of comity the corporations of one State are permitted to do business in another, unless it conflicts with the law or unjustly interferes with the rights of the citizens of the State into which they come. Under such circumstances, no citizen of a State can enjoin a foreign corporation from pursuing its business. Until the State acts in its sovereign capacity, individual citizens cannot complain. The State must determine for itself whether the public good requires that its implied assent to the admission shall be withdrawn."

In *Western Union Telegraph Co.* v. *Massachusetts*, *125 U. S., 554*, it was held that an injunction authorized to be issued by the public statutes of Massachusetts, prohibiting the company from doing business in the State until it had paid a certain tax was an unnecessary remedy and in contravention of the statute of 1866. Similiarly in *Leloup* v. *Mobile*, *127 U. S., 640*, the congressional authority to do business is made a feature. The tax in that case was expressly upon the privilege of telegraphing.

To license or prohibit a business and to license or prohibit the exercise of a general corporate franchise of doing business, or exercising corporate powers or functions, are quite different things. One is a business tax; the other a franchise tax. The distinction is illustrated by reference to the case of *Home Insurance Co.* v. *New York*, *119 U. S., 129*, from which it is assumed, the recent case of Home Insurance Co., not yet reported, does not substantially differ. The fourth section of the Pennsylvania statute here in question imposes a capital stock tax upon corporations. This capital stock tax has been held to be a property tax. Being such, government bonds held by corporations, and representing so far their capital, are excluded from the operation of the tax. A comparison of the provisions of the New York statute of 1881 with the provisions of the fourth section of the Pennsylvania act of 1879 will show that they are substantially alike, except that the New York statute uses the term "corporate franchise or business," as defining the subject of the tax. The tax is therefore in form a franchise tax, although there is no practical difference in effect between the Pennsylvania statute and the New York statute. Government bonds are included with the operation of the latter, but not within the operation of the former.

It may be admitted, without impairing the argument, that if a State permits foreign corporations to do business within it, any regulations of commerce done by such

corporations would be invalid, and it may be further admitted that the language of the grant in the Constitution, with reference to the power of Congress over commerce, is general, and includes alike commerce by individuals, partnerships, associations, and corporations; that is to say, it includes all commerce, by whatsoever instrumentalities it is performed, but, as before observed, it does not confer any new powers or capacities upon the persons who engage in commerce. These powers and capacities, in the case of artificial persons, are subject to the will of the sovereignty which creates them, and to recognition or non-recognition by other sovereignties.

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